

Unconscionability as a Sword: The Case for an Affirmative Cause of Action

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Consumers are drowning in a sea of one-sided fine print. To combat contractual overreach, consumers need an arsenal of effective remedies. To that end, the doctrine of unconscionability provides a crucial defense against the inequities of rigid contract enforcement. However, the prevailing view that unconscionability operates merely as a “shield” and not a “sword” leaves countless victims of oppressive contracts unable to assert the doctrine as an affirmative claim. This crippling interpretation betrays unconscionability’s equitable roots and absolves merchants who have already obtained their ill-gotten gains. But this need not be so.

Using California consumer credit law as a backdrop, this Note argues that the doctrine of unconscionability must be recrafted into an offensive sword that provides affirmative relief to victims of unconscionable contracts. While some consumers may already assert unconscionability under California’s Consumers Legal Remedies Act, courts have narrowly construed the Act to exempt many forms of consumer credit. As a result, thousands of debtors have remained powerless to challenge their credit terms as unconscionable unless first sued by a creditor. However, this Note explains how a recent landmark ruling by the California Supreme Court has confirmed a novel legal theory that broadly empowers consumers—including debtors—to assert unconscionability under the State’s Unfair Competition Law. Finally, this Note argues that unconscionability’s historical roots in courts of equity—as well as its treatment by the

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Uniform Commercial Code and the Restatements—reveal that courts already possess an inherent equitable power to fashion affirmative remedies against unconscionable contracts under the common law, even absent statutory authorization.

Introduction	2016
I. Background.	2019
II. Unconscionability as a Shield: The Inadequacy of Nonenforcement	2026
III. California’s Consumers Legal Remedies Act: A Partial Solution..	2035
A. Courts Have Narrowly Interpreted the CLRA to Exclude Credit	2035
B. The Exclusion of Financial Services from the CLRA Is Inconsistent with the Statute’s Broad Consumer Protection Mandate	2039
IV. A Sword at Last: Unconscionability as Unfair Competition	2041
V. Invoking Courts’ Equitable Discretion to Furnish a Sword under the Common Law	2049
A. Unconscionability’s History under the Common Law, UCC, and Restatements Reveals That It May Be Asserted Offensively	2050
B. Allowing Affirmative Relief from Unconscionable Contracts Is Consistent with the Doctrine’s Historical Roots in Courts of Equity.....	2054
C. Courts May Invoke Equitable Remedies to Affirmatively Remedy Unconscionable Contracts	2058
D. Allowing Affirmative Relief from Unconscionable Contracts Would Leave the Free Market and Freedom of Contract Intact 2064	
Conclusion	2070

INTRODUCTION

The doctrine of unconscionability reflects the long-settled principle that courts will not be used as “instruments of inequity and injustice” in the name of freedom of contract.¹ To that end, courts have long invoked the doctrine as a

1. U.S. v. Bethlehem Steel Corp., 315 US 289, 326 (1942) (Frankfurter, J., dissenting) (“[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? These principles are not foreign to the law of contracts. . . . More specifically, the courts generally refuse to lend themselves to the enforcement of a ‘bargain’ in which one party has unjustly taken advantage of the economic necessities of the other. ‘And there is great reason and justice in this rule, for necessitous men are not, truly speaking,

“flexible safety net”² to strike down contract terms that are “unreasonably and unexpectedly harsh,” “unduly oppressive,” or “so one-sided as to shock the conscience.”³ When asked to enforce a contract bearing such terms, courts may invoke unconscionability and refuse to enforce all or portions of the contract at their discretion.

But what role should unconscionability play in cases where the victim of contractual overreach has already performed under the contract? The current majority view leaves these victims with no remedy, since the doctrine of unconscionability purportedly “is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery.”⁴ Although some courts have departed from this view by considering the merits of an affirmative

free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”).

2. Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 74 (2006).

3. *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1007 (Cal. 2018) (quoting *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 910–11 (2015)).

4. *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987); *see also, e.g., Cowin Equip. Co., Inc. v. Gen. Motors Corp.*, 734 F.2d 1581, 1582 (11th Cir. 1984) (“[T]he cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision . . .”); *Galvin v. First Nat’l Monetary Corp.*, 624 F. Supp. 154 (E.D.N.Y. 1985); *Sanders v. Colonial Bank of Alabama*, 551 So.2d 1045 (Ala. 1989); *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1540 (Cal. Ct. App. 2003) (“[T]here is no cause of action for unconscionability under section 1670.5; that doctrine is only a defense to contract enforcement.”); *Shadoan v. World Sav. & Loan Ass’n*, 219 Cal. App. 3d 97, 101 (Cal. Ct. App. 1990) (“By its terms the statute presents a defense to an attempt to enforce such a contractual provision; those terms do not speak to a party who has fully performed a contract and seeks restitution, nor do they expressly grant the court the power to enjoin future action.”); *Dean Witter Reynolds v. Super. Ct.*, 211 Cal. App. 3d 758, 766 (Cal. Ct. App. 1989) (“[T]he language of Civil Code section 1670.5 does not support the bringing of an affirmative cause of action thereunder for including an unconscionable clause in a contract . . .”); *Wallace v. National Commerce Bancorporation*, 1993 WL 44600, at *3 (Tenn. Ct. App. Feb. 23, 1993) (affirming lower court ruling that, while unconscionability is a defense against contract enforcement, it does “not form the bas[is] for affirmative relief”); 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2–302:102 (3d ed. 1982) (“The unconscionability section of the Code does not authorize the recovery of any damages by the buyer, the relief obtainable being limited to that stated by the Code, namely, that the court may refuse to enforce the contract or the unconscionable provision.”); 15 WILLISTON ON CONTRACTS § 1763A at 215 (3d ed. 1972) (“[A] court under [§ 2–302] may not award damages to the party who enters into an unconscionable agreement.”); Seana Shiffirin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205–50, 229 (2000) (“The unconscionability doctrine, famously, operates as a shield and not as a sword. One may protect oneself against enforcement of an unconscionable contract, but one may not obtain damages for having been subject to an unconscionable offer; nor may one seek restitution for compliance with an unconscionable contract.”) (emphasis added).

unconscionability claim,⁵ such cases remain rare. But as many scholars⁶ and a handful of courts have rightly observed, the traditional interpretation is both descriptively and normatively unsound and should therefore be abandoned.

Using consumer credit law as a backdrop, this Note argues that the doctrine of unconscionability must be recrafted into an offensive sword that provides affirmative relief to victims of unconscionable contracts. While this article focuses on consumer credit law, much of its analysis can be readily applied to any other context in which unconscionability is a salient issue.

Part I sets the stage by discussing why effective consumer remedies are vital to combat widespread contractual overreach. Part II explains why the traditional view of unconscionability as a solely defensive doctrine is unjust, arbitrary, and inefficient. Part III describes how California's Consumers Legal Remedies Act, which expressly authorizes affirmative unconscionability claims, fails to exhaustively solve this remedial deficiency within the consumer credit industry. However, Part IV reveals how a landmark decision by the California Supreme Court has opened a new door for consumers to assert unconscionability affirmatively under California's Unfair Competition Law. Finally, Part V argues that unconscionability's historical roots in courts of equity—as well as its treatment by the Uniform Commercial Code and the Restatements—reveal that courts already possess an inherent equitable power to fashion affirmative remedies against unconscionable contracts, even absent statutory authorization.

5. See, e.g., *Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862, 896 (N.D. Ohio 2001) (“[U]nconscionability may be an affirmative claim if pleaded correctly.”); *Williams v. First Gov't Mortg. & Invs. Corp.*, 225 F.3d 738, 747–49, 752 (D.C. Cir. 2000) (remanding plaintiff's common law unconscionability claim for further consideration); *Mitchem v. Am. Loan Co.*, No. 99-C1868, 2000 WL 290276, at *4 (N.D. Ill. Mar. 17, 2000) (finding plaintiff adequately alleged an affirmative unconscionability claim); *Sharp v. Chartwell Fin. Servs. Ltd.*, No. 99-C3828, 2000 U.S. Dist. LEXIS 3143, at *4 (N.D. Ill. Feb. 28, 2000) (“Plaintiffs’ complaint sufficiently alleges a claim for unconscionability.”); *Cobb v. Monarch Fin. Corp.*, 913 F. Supp. 1164, 1179–80 (N.D. Ill. 1995) (denying defendant's motion to dismiss affirmative unconscionability claim); *Ahern v. Knecht*, 563 N.E.2d 787 (Ill. App. Ct. 1990) (affirming lower court decision that awarded plaintiff restitutionary relief); *Dienes v. McKenzie Check Advance of Wis., LLC*, No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *12–*16 (E.D. Wis. Dec. 11, 2000) (certifying class action alleging consumer loan agreements were unconscionable under state common law).

6. See, e.g., JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE, § 5, at 220–21, 236–40 (6th ed. 2010) (contending that courts have erred in concluding that unconscionability can never be used to obtain affirmative relief); Hazel Glenn Beh, *Curing the Infirmities of Unconscionability*, 66 HASTINGS L.J. 1011, 1021–25 (2015) (same); H.G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 484–86, 545–48 (1995) (same); *infra* note 155 and accompanying text; *cf. infra* notes 39, 169, 207 and accompanying text.

I.
BACKGROUND.

A scourge of contractual unfairness is plaguing today's consumer markets.⁷ Because consumers seldom read form and Internet contracts,⁸ firms are incentivized to hide unduly one-sided terms in fine print.⁹ Many consumers are unaware that they are bound to such terms until it is too late. Those who notice an offensive term in advance may have no choice but to accept it nonetheless, for virtually all consumer contracts today are offered on an adhesive, take-it-or-

7. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2014) [hereinafter RADIN, *BOILERPLATE*] (discussing how firms' rampant use of boilerplate contracts oppresses consumers and undermines the rule of law through "democratic degradation"); *infra* notes 20–29 and accompanying text. But see Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006) (suggesting that, due to reputational concerns, firms avoid universally enforcing one-sided contract terms in favor of more selective enforcement to deter consumer opportunism).

8. See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 164 (2013) (purchasing four standard laptops as an experiment and finding that *each* laptop was governed by an average of *twenty-five separate contracts* comprising an average of *71,828 words*—about the length of the first Harry Potter novel—with “nine out of every ten of those boilerplate terms arriv[ing] late in the transaction, long after the seller had been paid”); Florencia Marotta-Wurgler et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 1, 2 (2014) (conducting an empirical study to find that “only one or two in 1,000 shoppers access a product’s EULA [End User License Agreement] for at least 1 second,” and concluding that this informed minority is insufficient to police against one-sided contract terms); Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 41 S. CALIF. L. & POL’Y 543, 553–65 (2008) (finding that it would cost the average American about 244 hours annually—or *thirty full eight-hour working days*—to fully read the online privacy terms to which they are bound); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, INFO., COMM. & SOC’Y (2018) (describing an empirical study in which 93% of consumers agreed to a contract without noticing a “child assignment clause” that would have provided the consumer’s first-born child as payment).

9. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHIC. L. REV. 1203, 1206 (2003) [hereinafter Korobkin, *Bounded Rationality*] (“Because buyers are boundedly rational rather than fully rational decisionmakers, when making purchasing decisions they take into account only a limited number of product attributes and ignore others. While sellers have an economic incentive to provide the efficient level of quality for the attributes buyers consider (‘salient’ attributes), they have an incentive to make attributes buyers do not consider (‘non-salient’ attributes) favorable to themselves, as doing so will not affect buyers’ purchasing decisions.”); *infra* notes 11, 16–20, 239, and accompanying text.

leave-it basis.¹⁰ Thus, to participate in the modern economy, consumers must capitulate as firms weaponize fine print¹¹ and legislate by contract.¹²

10. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) [hereinafter Slawson, *Standard Form Contracts*] (“Standard form contracts probably account for more than ninety-nine percent of all the contracts now made.”). For a classic analysis of adhesion contracts, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943):

Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords, enabling them to impose a new feudal order of their own making upon a vast host of vassals.

Even Professor Arthur Leff, perhaps the unconscionability doctrine’s most notorious scholarly critic, has called Kessler’s article on the adhesion doctrine “its most elegant and powerful discussion.” Arthur Allen Leff, *Contract As Thing*, 19 AMER. UNIV. L. REV. 131, 142 (1970). For Professor Leff’s widely-cited article sharply critiquing UCC § 2–302 and famously inventing the modern bifurcation of unconscionability into “substantive” and “procedural” elements, see Arthur Allen Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

11. See, e.g., Fed. Trade Comm’n v. AMG Services, Inc., 29 F. Supp. 3d 1338, 1351 (D. Nev. 2014) (“[T]he material terms in the fine print are . . . hidden from borrowers. These terms, which significantly alter the parties’ legal obligations from what is implied . . . are concealed from borrowers because they are scattered throughout the fine print. . . . This structure gives the impression that a \$300.00 loan from the Lending Defendants will only cost borrowers \$90.00, when in fact, unless borrowers read the fine print and take the necessary steps to opt out of the renewal plan, such a loan will incur \$675.00 in fees.”) (citations omitted); see also DAVID CAY JOHNSTON, *THE FINE PRINT: HOW COMPANIES USE “PLAIN ENGLISH” TO ROB YOU BLIND* (2014); NAT’L ECON. COUNCIL, *THE COMPETITION INITIATIVE AND HIDDEN FEES* 7–15, 9 (Dec. 2016) https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf [<https://perma.cc/UNU6-BMRU>] (describing “major examples of hidden fees in the U.S. economy”); BOB SULLIVAN, *GOTCHA CAPITALISM: HOW HIDDEN FEES RIP YOU OFF EVERY DAY AND WHAT YOU CAN DO ABOUT IT* (2d ed. 2018); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Margaret Jane Radin, *Blackmailed by the Fine Print*, LOS ANGELES TIMES (Feb. 03, 2013), <http://articles.latimes.com/2013/feb/03/opinion/la-oe-radin-boilerplate-redress-rights-20130203> [<https://perma.cc/QP8R-XHQP>].

12. See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 1–2 (2002) (“[W]hen the law enforces the terms of the contract supplied by the seller, in effect it is allowing the seller to reshape the law to its advantage but without the popular participation we normally associate with legislation in a liberal state.”); Slawson, *Standard Form Contracts*, *supra* note 10, at 530 (“[T]he overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered. Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms. Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.”); see also Kessler, *supra* note 10 and accompanying text. See generally RADIN, *Democratic Degradation: Replacing the Law of the State with the “Law” of the Firm*, in *BOILERPLATE*, *supra* note 7, at 33–51 (discussing how mass-market form contracts “convert[] rights enacted and guaranteed by the state into rights that can be ‘condemned’ by private firms”).

Moreover, recent advances in behavioral economics and psychology have challenged the assumptions of market efficiency and consumer rationality that underlie neoclassical economics, revealing how market forces often fail to protect consumers from contractual overreach.¹³ Guido Calabresi once wrote that “if one assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocations of resources would be fully cured in the market by bargains.”¹⁴ But modern behavioral economics has called these assumptions into question, showing how asymmetric information¹⁵ and inflated transaction costs¹⁶ create market failures that warrant state intervention to protect disadvantaged parties.¹⁷ By the same token, discoveries in behavioral psychology have shown

13. See Richard A. Posner, *Why is There No Milton Friedman Today?*, 10 *ECON. J. WATCH* 210, 212 (2013) (“[B]ehavioral economics’ . . . has undermined the economic model of man as a rational maximizer of his self-interest and helped to expose the rampant exploitation by business of consumer psychology. Businesses know, and economists are learning, that consumers are easily manipulated by sellers into making bad choices—choices they would never make if they knew better—in borrowing and investing, and in buying goods and services. . . .”); Cass R. Sunstein, Christine Jolls, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998) (discussing how empirical evidence undermines the assumptions of rationality embedded in classical economic legal analysis); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 *U. CHI. L. REV.* 249 (2006) (same); *infra* notes 15–20 and accompanying text.

14. Guido Calabresi, *Transaction Costs, Resource Allocation, and Liability Rules: A Comment*, 11 *J. L. & ECON.* 67, 68 (1968) (emphasis removed).

15. See THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* 30 (2013) (“[T]he argument that consumers should be completely free to choose risky products assumes that they are fully informed about their risks and the benefits when that information is either unavailable or easily lost in the blizzard of seller-provided information that they encounter in advertising or the fine print of incomprehensible adhesion contracts.”); Erin Delaney & Samuel Issacharoff, *Credit Card Accountability*, 73 *U. CHIC. L. REV.* 157, 166 (2006) (“Increasingly, the relations between large sellers and multiple small buyers becomes a world of contracts of adhesion, with terms and conditions set by the seller with no realistic prospect of negotiation. When markets prove not to have price competition, or when information is difficult to obtain and the transactional barriers to leaving one seller to find another are high, the risk of seller misbehavior is heightened.”); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 *HARV. L. REV.* 741, 778–85 (1982) (noting that “[o]ne condition of a perfectly competitive market is a homogeneous marketplace in which cost-free information concerning price is readily available,” yet observing that this condition is rarely met in consumer markets); Joseph E. Stiglitz, *Markets, Market Failures, and Development*, 79 *AMER. ECON. REV.* 197 (1989) (discussing how “costly and imperfect information” creates market failures).

16. Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 *WM. & MARY L. REV.* 1635 (2006) (“Contrary to the predictions of conventional economic theory, firms often benefit by increasing consumer transaction costs. Firms do so by . . . obscuring contract terms in a variety of ways . . . [and] by taking advantage of predictable consumer behaviors. . . .”); see also David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 *MICH. L. REV.* 983 (2006); Victor Stango, *Pricing with Consumer Switching Costs: Evidence from The Credit Card Market*, 50 *J. INDUS. ECON.* 475 (2002) (empirically finding that creditors raise prices when consumer “switch costs” are highest); George J. Stigler, *The Economics of Information*, 69 *J. POL. ECON.* 213 (1961) (showing that firms have an incentive to artificially inflate consumer search costs because buyers will only seek salient information up until the point that search costs exceed the value of the information); *infra* note 20 and accompanying text (observing how marketers use behavioral insights to inflate consumers’ transaction costs).

17. See CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELLNESS, AND HAPPINESS* 4–6 (2008) (questioning traditional economic assumptions of

how common cognitive biases and bargaining heuristics impair consumer decision-making,¹⁸ further undercutting the neoclassical assumption that consumers are “rational maximizers” of their own self-interest.¹⁹

As sophisticated businesses equipped with teams of attorneys and marketing experts increasingly exploit these behavioral findings,²⁰ consumers

consumer rationality and developing a theory of “libertarian paternalism” that seeks to identify minimally intrusive government interventions to correct these behavioral market failures); Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 750 (2008) (“[I]n certain markets, consumer mistakes and sellers’ strategic response to these mistakes are responsible for a substantial welfare loss, potentially justifying legal intervention.”).

For a critique of consumer law’s reliance on behavioral theory, see generally Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216 (2012) (criticizing modern consumer law for its incompatibility with rational choice economics and traditional antitrust law); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012).

18. See DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010) (presenting a variety of experiments that reveal how consumer decision-making is boundedly rational); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 107 (2014) (“People err because they distort, filter, and misinterpret information, as a great and growing literature in social psychology and behavioral economics is showing.”); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (arguing that courts should consider various “psychological constraints on decisionmaking” when deciding whether to enforce standardized form contracts); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Daniel Kahneman & Amos Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); Russell Korobkin & Chris Guthrie, *Heuristics: Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004); Korobkin, *Bounded Rationality*, *supra* note 9 and accompanying text; *supra* notes 13, 17, and accompanying text.

19. Posner, *supra* note 13 and accompanying text; see also Using Behavioral Science Insights to Better Serve the American People, Exec. Order No. 13,707, 80 Fed. Reg. 56,365 (Sept. 15, 2015); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 2 (2012) (“We consumers are imperfectly rational, our decisions and choices influenced by bias and misperception. Moreover, the mistakes we make are systematic and predictable. Sellers respond to those mistakes. They design products, contracts, and pricing schemes to maximize not the true (net) benefit from their product, but the (net) benefit as perceived by the imperfectly rational consumer. Consumers are lured, by contract design, to purchase products and services that appear more attractive than they really are. This Seduction by Contract results in a behavioral market failure.”) (emphasis removed); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211, 1211–12 (2003) (“Recent research in behavioral economics has identified a variety of decision-making errors that may expand the scope of paternalistic regulation. To the extent that the errors identified by behavioral research lead people not to behave in their own best interests, paternalism may prove useful.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

20. See, e.g., JOACHIM BÜSCHKEN, HIGHER PROFITS THROUGH CUSTOMER LOCK-IN: A ROADMAP vii, 1 (2004) (proposing that marketers should use behavioral insights to create “switching costs” to make consumers “economic hostages” to a firm, thereby granting the firm the “monopolistic power” to charge higher prices); Eric A. Greenleaf et al., *The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing*, 26 J. CONSUM. PSYCH. 105–24 (2015) (describing how firms utilize behavioral insights to obscure salient information through “partitioned pricing” techniques, including, “drip pricing,” “shrouded attributes,” “price obfuscation,” “price complexity,” and more); Rebecca W. Hamilton, et al., *When Should You Nickel and Dime Your*

find themselves bound to oppressive terms at an unprecedented rate. Forced arbitration clauses and class-action waivers inoculate firms from liability and systematically erode civil rights.²¹ Fringe banking and predatory loans obscure hidden fees²² and trap borrowers in endless cycles of crippling debt.²³ Choice-of-law and choice-of-forum clauses disenfranchise plaintiffs and place their fate

Customers? A Manager's Guide To Benefits-Based Price Partitioning, 52 MIT SLOAN MGMT. REV. 59 (2010) (instructing marketers how they can maximize revenue by obfuscating price information); see also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 NYU L. REV. 630 (1999) (extensively surveying the literature on how businesses utilize the insights of behavioral economics and psychology to manipulate consumers in their favor); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (same); Guang-Xin Xie & David M. Boush, *Where to Draw the Line? Managerial Implications of Behavioral Research on Deceptive Advertising*, in CRACKING THE CODE: LEVERAGING CONSUMER PSYCHOLOGY TO DRIVE PROFITABILITY 89–111 (Stevens S. Posavac ed., 2012).

21. See, e.g., *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); see also Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 499–500 (2017) (describing how arbitration clauses “block[] access to courts,” allowing businesses to “sidestep swaths of law”); Anjanette Raymond, *It is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666 (2013).

22. See, e.g., *Fed. Trade Comm'n v. AMG Serv., Inc.*, 29 F. Supp. 3d 1338, 1354–55 (D. Nev. 2014) (finding lender's misleading disclosures implied that “only one [\$90] finance charge would be incurred while the fine print created a process under which multiple finance charges [totaling \$675] would be automatically incurred unless borrowers take affirmative action”); see also Ronald J. Mann, “Contracting” for Credit, 104 MICH. L. REV. 899, 901 (2006) (“[S]ophisticated card issuers have learned to exploit the boilerplate features of their agreements to produce a set of dynamic contracting obligations that even sophisticated cardholders could not understand.”).

23. See Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 391–418 (Edward J. Balleisen & David A. Moss eds., 2009) (“The consumer credit market is broken. *Businesses have learned to exploit customers' systematic cognitive errors, selling complex credit products that are loaded with tricks and traps.* Because customers cannot see or understand complete credit terms until it is too late, the market no longer operates to achieve competitive efficiency. Instead, creditors engage in a race to the bottom, boosting profits by offering ever-riskier products that families are poorly equipped to handle.”) (emphasis added); NAT'L CONSUMER LAW CTR., MISALIGNED INCENTIVES: WHY HIGH-RATE INSTALLMENT LENDERS WANT BORROWERS WHO WILL DEFAULT (2016) (discussing how lenders intentionally target vulnerable borrowers, assuming they will default), http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-misaligned-incentives.pdf [https://perma.cc/EAN8-26WP]; CHRISTOPHER PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 14 (“[P]ayday loans may become a trap they cannot escape without missing rent, utilities, car payments, or food expenditures. These loans can create a biweekly cycle of income and expenses leaving only enough surplus income to pay the most recent accrual in interest and fees.”).

in faraway lands of firms' own choosing.²⁴ Exculpatory clauses²⁵ and disclaimers of implied warranties excise consumer remedies and release firms of their most basic obligations.²⁶ And the list goes on.²⁷ Meanwhile, browse-wrap, click-wrap,

24. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum-selection clause requiring Washington-based plaintiffs to sue in Florida, despite plaintiffs not living or purchasing tickets in Florida and although the cruise trip did not travel to Florida). See generally Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); William J. Woodward Jr., *Constraining Opt-Outs: Shielding Local Law and Those it Protects from Adhesive Choice of Law Clauses*, 40 LOY. LA L. REV. 9 (2006).

25. See Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 215–37, 218–19 (Gregory Kalss et al. eds., 2014) (“[D]eletion of remedies for harm to others . . . is likewise an assault on the underlying structure of the polity. . . . The battleground in the U.S. has been whether one can exculpate for one’s own negligence, and many states have drifted toward this position. In the mass-market boilerplate context, the arguments for this position do not survive scrutiny. . . . [W]e ought to grant that everyone bears a social responsibility not to harm others, usually expressed in tort law. It should not be so easy to shuck this responsibility by deploying boilerplate.”). See generally Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHI.-KENT. L. REV. 379 (2014) (discussing the enforceability of exculpation clauses, which relieve parties of liability in the event they are negligent); Robert A. Seligson, *Contractual Exemption from Liability for Negligence*, 44 CALIF. L. REV. 120 (1956) (same).

26. The implied warranty of merchantability is a paradigmatic consumer protection recognized by the UCC, but it is “undermined by the relative ease with which the Commercial Code permits implied warranties to be disclaimed.” Ralph J. Swanson, *Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work*, 14 SANTA CLARA L. REV. 575, 588–89 (1974). For more on implied warranties, see generally George W. Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 ST. LOUIS U. L.J. 435 (1976); Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT. L. REV. 199 (1985); William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

27. Of particular concern are “unilateral modification clauses,” which give drafting parties the exclusive right to alter the terms of a binding contract at any time by simply posting a purported “notice” on the firms’ website. See generally Peter A. Alces & Michael M. Greenfield, *They Can Do What?! Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1102–05 n.5–9, n.12–15 and accompanying text (2010) (providing over two dozen examples of unilateral modification clauses from major companies); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010) (analyzing courts’ treatment of unilateral modification clauses and encouraging lawmakers to prohibit drafters from unilaterally amending procedural terms); Eric A. Horwitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75 (2007) (exploring the application of unilateral modification clauses to mass-market adhesion contracts).

and shrink-wrap²⁸ “contracts” continue to push the bounds of contract law—and with it, good faith itself—to its outermost limits.²⁹

It is vital that courts and legislatures equip consumers with an arsenal of effective remedies to deter and rectify unconscionable contractual overreach. Indeed, courts have long professed a commitment to the universal maxim that “[f]or every wrong there is a remedy”³⁰—and for good reason. Remedies breathe life and meaning into otherwise abstract and unrealized rights. Remedies hold us to our ideals. A right without a remedy is simply a statement of our values. But the sincerity of those values is in doubt unless we provide an effective means to realize those rights. By providing a vehicle through which we vindicate our substantive rights, remedies form a foundational element of the rule of law.³¹ But as Dean Roscoe Pound pointed out over 100 years ago, “with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it

28. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150–51 (7th Cir. 1997) (enforcing an arbitration clause in a shrink-wrap license); *ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). For perspectives critiquing courts’ enforcement of late-arriving terms, see NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 143 (2013) (accusing Judge Frank Easterbrook of “mangling contract doctrine” in *ProCD v. Zeidenberg*); Roger C. Bern, *Terms Later Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641 (2003); James Gibson, *Click to Agree: We Don’t Ignore Price. Why do we Ignore Boilerplate Contracts?*, in RICHMOND L. MAG. (Winter 2013) (“[I]f you really want to ‘shop’ for boilerplate, you have to order multiple computers, await their arrival, start them all up, open the various programs, and then examine the boilerplate within. Only then could you register your rejection of boilerplate terms with the marketplace—e.g., by returning the rejected computer and receiving a refund. Good luck with that.”); John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35 (2012). But see Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 312 (2009) (empirically studying software contracts and concluding that “buyers do not, on average, receive more pro-seller contracts when the terms are disclosed only after purchase”).

29. See KIM, *supra* note 28 (discussing firms’ widespread use of wrap contracts to bind consumers to oppressive and unexpected terms); Gibson, *supra* note 8; Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1 (2011); Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187 (2008).

30. CAL. CIV. CODE § 3523 (2019). For a discussion of the history and importance of the right to a remedy, see Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 NYU L. REV. 1309 (2003); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71 (2001); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

31. Erin Delaney, ‘Right to an Effective Remedy’: Judicial Protection and European Citizenship (2004) (Federal Trust Constitutional Online Paper Series No. 17/04), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=580783 [<https://perma.cc/D553-JLKP>] (“The right to an effective remedy has long been considered a fundamental right of a society based on the rule of law. Blackstone described the right to an effective remedy as a ‘subordinate’ right, ‘through which people vindicated their absolute rights.’ Inexorably linked to the right to an effective remedy is, therefore, the corresponding right to judicial access.”).

impracticable to assert them when they are infringed.”³² Despite many calls over the years to expand consumers’ access to private remedies,³³ there is still much work to be done. Reviving the unconscionability doctrine is a good place to start.³⁴

II.

UNCONSCIONABILITY AS A SHIELD: THE INADEQUACY OF NONENFORCEMENT

Unconscionability has been widely invoked as a social safety net to protect consumers from the inequities of rigid, formalist contract enforcement.³⁵ By

32. Roscoe Pound, *Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 316 (1913); see also Thurgood Marshall, *Group Action in the Pursuit of Justice*, 44 NYU L. REV. 661, 668 (1969) (observing the importance of effective remedies to “protect the consumer from the predatory commercial practices so common in many of our cities”).

33. For example, Professor Addison Mueller wrote:

Consumer dissatisfaction with this state of affairs has been steadily mounting. It adds to such other dissatisfactions as those stemming from harsh credit terms, unreasonable and not fairly disclosed financing costs, misleading advertising, and lack of understandable labeling. That the voice of this complaint is being ever more clearly raised and ever more attentively listened to is evidenced by recent movement toward statutes calling for full disclosure of ‘true’ financing costs and providing escape hatches for victims of fast-talking door-to-door salesmen. But the aim of most of this activity has been to help buyers avoid the grasp of over-reaching sellers. *It has given the consumer a variety of shields but not a single sword. Hence he still cannot fight effectively for the full benefit of his bargain in a routine deal that has gone sour.*

Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 593 (1969) (emphasis added); see also Thomas Eovaldi & Joan Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U. L. REV. 281, 282 (1971) (“The neglect of the means for effective assertion of legal rights is especially poignant in the case of the low-income consumer whose daily life reveals the law as an instrument of harassment and oppression.”); Thomas L. Eovaldi, *Private Consumer Substantive and Procedural Remedies under State Law*, 15 ANTITRUST BULL. 255, 275 (1971) (urging an expansion of consumer remedies, including higher damages awards and attorney’s fees); Richard A. Givens, *Comment: Roadblocks to Remedy in Consumer Fraud Litigation*, 24 CASE. W. RES. L. REV. 144, 144 (1972) (“Although tremendous public attention is paid today to substantive rules governing consumer transactions, present procedures often make effective action to remedy violations of these rules extremely difficult.”); Stephen L. Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831, 831 (1968) (“Most commentators on the consumer problems of the unsophisticated buyer have felt that present law is inadequate to remedy existing abuses and have called for new legislation.”); John W. Wade & Robert D. Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031 (1969) (discussing the remedies available at law and equity for defrauded consumers); Comment, *Private Remedies under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U. L. REV. 413, 443 (1972) (arguing “in support of the judicial activism necessary to imply private remedies under the consumer fraud acts”); Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1965).

34. See John Brady, *Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds*, 23 U. FLA. L. REV. 528, 534 (1971) (“A more liberal judicial attitude toward application of the unconscionable contract doctrine . . . could do much to improve the lot of consumers.”).

35. See generally Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 71 (2008) (“The main doctrinal vehicle for policing [consumer credit] transactions is the unconscionability doctrine.”); Steven Bender, *Rate Regulation at the Crossroads of Usury and*

providing the defensive remedy of nonenforcement, unconscionability equips courts with a tool to “catch cases of contractual injustice that slip by formulaic contract defenses.”³⁶

But the prevailing view of unconscionability as *solely* a defense unjustly enriches wrongdoers and cripples the doctrine’s remedial potential.³⁷ This unwarranted denial of affirmative unconscionability claims defies logic, violates basic principles of fairness and moral responsibility, promotes inefficiency, and fails to adequately deter contractual overreach.

Justice Benjamin Cardozo wrote in *The Nature of the Judicial Process* that “the principle that no man should profit from his own inequity or take advantage of his own wrong” is a principle with “roots deeply fastened in universal sentiments of justice.”³⁸ But such unjust enrichment is precisely what occurs when the state denies an affirmative unconscionability claim.

Indeed, numerous restitution scholars have observed the link between the doctrines of unconscionability and unjust enrichment.³⁹ Many have suggested that, if an unconscionable contract is fully executed, unjust enrichment necessarily results.⁴⁰ In such cases, scholars argue, an affirmative restitution

Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard, 31 HOUS. L. REV. 721 (1994) (arguing that unconscionability’s flexible, *ex post* application makes the doctrine a better tool to counter oppressive credit terms than rigid, statutory usury caps); Anne Fleming, *The Rise and Fall of Unconscionability as the ‘Law of the Poor’*, 102 GEO. L.J. 1383 (2014) (recounting the history of unconscionability as a social welfare mechanism); H. James Stedronsky, *Unconscionability and Standardized Contracts*, 5 N.Y.U. REV. L. & SOC. CHANGE 65, 66–67 (1975) (“[Unconscionability] provides courts with a framework which allows them to examine standardized contracts as public instruments and deal with them accordingly. Properly applying § 2–302, courts need not be afraid to use broadly the powers recently granted them by many state legislature in consumer protection acts.”).

36. Schmitz, *supra* note 2, at 76.

37. See Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 650–53 (1994) (arguing that current unconscionability doctrine provides insufficient remedies, and urging the Oregon legislature to create a private right of action that consumers may assert affirmatively to seek restitution when subjected to unconscionable contracts).

38. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 41 (1921).

39. See, e.g., GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 53 (3d ed. 2015) (“[T]he origins of what is now called unjust enrichment can be traced back to the notion that the defendant’s retention of a gain would be against conscience. . . . Lord Mansfield recognized that the action for money had and received was ‘founded upon large principles of equity, where the defendant can not conscientiously hold the money.’”) (citing *Sadler v. Evans*, 4 Burr 1984, 1986, 98 ER 34, 35 (1766); *Moses v. Macferlan*, 2 Burr 1007, 1011, 97 ER 676 680 (1760)); Joshua Getzler, *Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention*, 16 MONASH U. L. REV. 283, 285 (1990) (“The scope of the unjust enrichment idea as a source of rights and duties . . . is often linked or related to the established unconscionability principle.”); *infra* notes 40–44; cf. Mark P. Gergen, *What Renders Enrichment Unjust*, 79 TEX. L. REV. 1927, 1963 (2001) (discussing “[unjust] enrichment by impoverishment” as a theory of liability based “on the idea that it is wrong to profit from another’s misfortune”).

40. See PETER BIRKS, *UNJUST ENRICHMENT* 5–6 (2d ed. 2005) (arguing that it is inequitable for a firm that receives money from an unconscionable contract to retain that money if an aggrieved party later demands restitution); Mindy Chen-Wishart, *In Defence of Unjust Factors: A Study of Rescission for Duress, Fraud and Exploitation*, in UNJUSTIFIED ENRICHMENT: KEY ISSUES in

claim may remedy the unjust enrichment.⁴¹ For example, in his essay *Unconscionable Enrichment?*, Professor Prince Saprai argues that “unconscionability and its cognate exploitation may offer a very plausible moral explanation of the duty to make restitution, in at least some cases of unjust enrichment.”⁴² Under Saprai’s analysis, the inherent exploitation of unconscionable contracts constitutes a “wrongdoing” that, in certain cases, triggers a duty to make restitution for unjust enrichment.⁴³ Professor Michael Lobban similarly described how the action of unjust enrichment in English common law historically allowed restitution “when a plaintiff’s case fell within one of the situations in which the common law judges determined *that the retention of money was unconscionable*.”⁴⁴ Thus, there is ample support, both in the common law and in scholarship, for allowing affirmative unconscionability claims.

By denying such claims, the state grants firms an entitlement to be free from liability for unconscionable contracts,⁴⁵ despite simultaneously declaring

COMPARATIVE PERSPECTIVE 159–93, 166 (David Johnston & Reinhard Zimmermann eds., 2004) (“Unconscientious procurement . . . describes defendants who deliberately and actively exert pressure . . . to induce the plaintiffs’ consent . . . to the contract and to its performance. The law will not assist in the enforcement *or retention* of benefits obtained by such active taking of advantage. Located here are cases of deceit or actual fraud, all kinds of duress, some cases of actual undue influence and of active *unconscionable conduct*.”) (emphasis added).

41. See PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 180–83 (1985); VIRGO, *supra* note 39, at 38–39 (“[R]estitution is prepared to intervene in . . . commercial transactions, primarily because the nature of the defendant’s conduct is *so unconscionable that restitution is appropriate* to protect the claimant from unscrupulous exploitation.”) (emphasis added); M. M. Litman, *The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust*, 26 ALTA. L. REV. 407, 436 n.130 (1988) (citing *Muchinski v. Dodds*, 60 A.L.J.R. 52 (1986) and *Bumgartner v. Bumgartner*, (Unreported judgments, December 10, 1987) as two decisions from the High Court of Australia that adopted the notion of “unconscionable retention of benefit” as a basis for an affirmative claim); Michael Lobban, *Restitutionary Remedies*, in *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME XII: 1820–1914 PRIVATE LAW* 563–613, 567 (2010); James McConville & Mirko Bagaric, *The Yoking of Unconscionability and Unjust Enrichment in Australia*, 7 DEAKIN L. REV. 225, 225 (2002) (praising a ruling by the Australia High Court that proposed “unjust enrichment be subsumed by the expanding doctrine of unconscionability” and concluded that unjust enrichment “triggers . . . equitable intervention to reverse or adjust the transfer of resources on the basis of unconscionability . . .”); Prince Saprai, *Unconscionable Enrichment?*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 417–36 (2009); Graham Virgo, *Failure of Consideration: Myth and Meaning*, in *UNJUSTIFIED ENRICHMENT*, *supra* note 40, at 122 [hereinafter Virgo, *Failure of Consideration*] (“[E]mphasis on the reason why the transaction is void explains why restitution is available in respect of fully executed transactions. *The recipient of the benefit has no better right to receive or retain the benefit after the transaction was executed than he or she did before.*”) (emphasis added) (citing *Guinness Mahon & Co. Ltd v. Kensington & Chelsea Royal Borough Council*, QB 215, 229 (1999); and *Kleinwort Benson Ltd v. Lincoln CC*, 2 AC 349, 416 (1999)); *infra* notes 164–176 and accompanying text.

42. Saprai, *supra* note 41, at 417–36, 417.

43. *Id.* at 433.

44. Lobban, *supra* note 41, at 563–613, 567.

45. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1091 (1972) (“[T]he state has granted the injurer an entitlement to be free of liability. . . .”); Stanley Ingber, *Rethinking Intangible*

such contracts unlawful.⁴⁶ This paradoxical regime calls into question courts' fidelity to the prohibition against unconscionable contracts in the first place. When the state declares unconscionable contracts illegal, it confers a duty upon drafters to avoid imposing such contracts.⁴⁷ As Wesley Hohfeld noted long ago, the failure to fulfill one's duty to another confers upon the victim a right to an affirmative claim against the offending party.⁴⁸ But when a court denies an affirmative unconscionability claim, it immunizes overreaching drafters from this duty and denies consumers their right to be free from unconscionable obligations.⁴⁹

Moreover, denying offensive unconscionability claims produces absurd results where victims of unconscionable terms who have *already paid* a merchant under an unconscionable contract are left with no remedy, while victims who *have yet to pay* under the same contract may still assert the doctrine as a defense.⁵⁰ For an illustrative discussion of this arbitrary distinction, consider the following from Professor H. G. Prince:

The distinction between defensive and offensive use is illogical and should be discarded because it may well result in only one of two

Injuries: A Focus on Remedy, 73 CALIF. L. REV. 772, 781–82 (1985) (“From the victim’s perspective, compensation is not just reimbursement, it is making amends for the injury done by bestowing a ‘consolation, a solatium.’ *Refusal to grant damages effectively bestows upon the injurer a form of legal ‘entitlement’ to cause the injury.* Although money damages may not be an equivalent to the injury experienced, they can serve as an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.”) (emphasis added).

46. CAL. CIV. CODE § 1670.5 (2018) (declaring unconscionable contracts to be unlawful); Letter from Assemblyman Jack R. Fenton, Chairman, Assembly Judiciary Committee, to Edmund G. Brown, Jr., Governor of California (Sept. 13, 1979) (explaining that the bill that would later become Civil Code § 1670.5 would make “all unconscionable contracts voidable and also provides that unconscionable provisions in a consumer contract are unlawful. This is designed to protect the uninformed consumer who enters into a patently unreasonable contract with an opportunity to void the agreement and seek legal remedies against the unscrupulous seller.”).

47. *Cf. infra* note 48 and accompanying text.

48. *Cf. Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–33 (1913) (“[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. . . . [A] duty is the invariable correlative of that legal relation which is most properly called a right or claim. . . . [T]he correlative of X’s right that Y shall not enter on the land is Y’s duty not to enter.”); *id.* at 55 (“A right is one’s affirmative claim against another, and a privilege is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative ‘control’ over a given legal relation as against another; whereas an immunity is one’s freedom from the legal power or ‘control’ of another as regards some legal relation.”). For Hohfeld’s sequel to his original article, see Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

49. *Cf. supra* note 48 and accompanying text. Section 1 of the bill that would later become California’s unconscionability statute, Assembly Bill 510 (1979), stated: “It is the intent of the Legislature to preserve inviolate *the rights of consumers . . . to remain free from unconscionable, fraudulent, and deceptive sales practices.*” A.B. 510, 1979–80 Reg. Sess. (Cal. 1979) (emphasis added).

50. *See Beh, supra* note 6, at 1023 (“The judicial view that equitable remedies other than nonenforcement are precluded weakens the doctrine immeasurably. Many courts that steadfastly hold that nonenforcement is the only remedy for unconscionability allow illogical results, and this view renders unconscionability worthless against dominant parties who have already obtained their ill-gotten benefits.”).

similarly situated parties being unable to make use of the unconscionability doctrine. For example, if two parties purchase appliances from door-to-door salespersons for outrageously and indefensibly exorbitant prices as a result of sharp dealing, the party who purchases on credit can refuse to pay and then use the unconscionability doctrine *defensively* to fend off a claim by the seller for payment. The party who has cash and is able to pay on delivery cannot use unconscionability to obtain a partial refund of the price or to rescind the transaction altogether under the approach that blindly denies affirmative relief on a claim of unconscionability.⁵¹

This arbitrary denial of redress fundamentally conflicts with the equitable principles underlying the unconscionability doctrine. As restitution scholar Graham Virgo notes in the context of remedies available against void contracts, “[t]he recipient of the benefit has no better right to receive or retain the benefit *after* the transaction was executed than he or she did before.”⁵²

One is left to wonder how courts can reasonably maintain such an apparently arbitrary policy. Some courts may subscribe to the mechanical jurisprudence of legal formalism, which views judicial decision-making as an exercise of “neutral and objective decision procedure,” thereby absolving courts of much of their normative agency and responsibility.⁵³ Others may view the denial of relief as a form of inaction that accordingly merits less moral scrutiny. Once disguised as blameless inaction, dismissal carries little normative weight.

But where an injustice has been brought before the court and a plea for relief has been heard, dismissal is *not* inaction. By denying relief against a demonstrably unconscionable contract, courts not only permit the exploitation of consumers but participate in it themselves. As Professor Duncan Kennedy put it in *The Stakes of Law, or Hale and Foucault!*, “[W]hen lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that *inaction is a policy*, and that the law is responsible for the outcome, at least in the abstract sense that the law ‘could have made it otherwise.’”⁵⁴ Rather than divorce themselves from responsibility for their inaction,⁵⁵ “courts should abandon the false distinction between offensive versus defensive use of the

51. Prince, *supra* note 6, at 485–86 (emphasis added).

52. Virgo, *The Failure of Consideration*, *supra* note 41, at 122 (emphasis added).

53. Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 535–36 (1988) (“These theorists attempt to answer normative questions about what the law should be by identifying a neutral and objective decision procedure that can generate answers and that fairly filters the shared values of individuals in the community through legitimate institutional structures.”). *See generally id.* at 534–42; *infra* notes 177–192 and accompanying text.

54. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEG. STUD. F. 327, 333–34 (1991) (emphasis added).

55. *See generally* Singer, *supra* note 53, at 536–37 (describing critical theorist critiques of formalism’s purportedly objective “decision procedures” as “illegitimate attempts to evade responsibility for moral choices about justice”).

[unconscionability] doctrine”⁵⁶ to ensure that no court is ever used as an instrument of inequity and injustice in the name of freedom of contract.

An exclusively defensive unconscionability doctrine also fosters inefficiency and perverse incentives. For example, the district court in *Williams v. Enterprise Holdings, Inc.* explained its denial of an affirmative unconscionability claim by writing, “to prevail in this manner Plaintiff would have needed to refuse payment, breached the contract, and then asserted unconscionability as a defense if sued . . . for refusing payment.”⁵⁷ Yet, forcing consumers into such a precarious position for the mere chance to petition a court for relief is fundamentally unfair. For example, while debtors refuse payment and wait to be sued, they may face adverse credit reporting and continued accrual of interest and fees. Even worse, consumers may even lose their homes while waiting to assert the doctrine defensively.⁵⁸ And those who intentionally breach to risk this “wait-and-see” strategy⁵⁹ will still face the high burden⁶⁰ of proving their unconscionability claim if and when they are ultimately sued. Such uncertainty is sure to dissuade many from bothering to challenge their contracts as unconscionable in the first place. It is wholly unreasonable to expect consumers to bear such significant risks to simply participate in a remedial system that is already largely stacked in favor of opponents who, if they are repeat players, likely have economies of scale and a larger incentive to seek a favorable ruling on the specific issue.⁶¹

56. Prince, *supra* note 6, at 466. Critics might fear the prospect of courts reopening contracts that were fully executed years ago, but as with any other claim, this concern may be easily overcome by simply adopting a reasonable statute of limitations period.

57. See, e.g., *Williams v. Enter. Holdings, Inc.*, No. 12-05531, 2013 LEXIS 38897, at *11 (E.D. Pa. 2013).

58. See, e.g., *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 278 (D. Del. 1999).

59. See Qi Zhou, *An Economic Perspective on Legal Remedies for Unconscionable Contracts*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE 129–43, at 139–40 (2010) (“Where the contract is void *ab initio* for the reason of unconscionability, there was never a legally binding contract between the parties. Even where the contract has been partially performed, either party could claim the return of the value which he has transferred to the other party on the ground of restitution. This eliminates the chance for the aggrieved party to adopt a ‘wait and see’ strategy in order to escape from the bad bargain.”).

60. See Paul Thomas, *Conscionable Judging: A Case Study of California Courts’ Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065, 1083 (2011) (empirically surveying California appellate decisions to find that roughly eighty to eighty-five percent of non-arbitration unconscionability claims fail at the appellate level).

61. See Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees As a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 331–34 (2010) (“[M]ere nonenforcement fails to address litigation’s systemic pro-seller bias. . . . [A] consumer is invariably at a disadvantage when it comes to litigating disputes: the seller is probably a repeat player and thus has economies of scale and a much greater incentive to litigate the specific issue. Additionally, because unconscionability generally requires an in-depth factual analysis to determine whether there was both procedural and substantive unconscionability . . . the cases are usually expensive to bring. Nonenforcement is insufficient to overcome those barriers.”) (quotations omitted); Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 101 (1974) (famously describing how “the institutional facilities for litigation” systemically favor “repeat players” over “one-shotters”).

Limiting the doctrine of unconscionability to nonenforcement also fails to adequately deter unconscionable conduct in the marketplace.⁶² Many consumers simply do not have the time, energy, or resources to defend themselves against firms' countless devices of contractual abuse. The defensive-only interpretation of the doctrine assures businesses that they will be free from liability under a theory of unconscionability as soon as the firm procures payment or performance from the consumer. This produces perverse incentives for businesses to draft and quickly execute unconscionable contracts.

Numerous scholars have noted the limited deterring effect of nonenforcement. As Professor W. David Slawson explained in his book *Binding Promises: The Late 20th-Century Reformation of Contract Law*, nonenforcement provides an important safeguard against oppressive contracts, but it provides little disincentive for businesses to refrain from contractual overreaching in the first place:

Unconscionability has been a valuable defense against egregious unfairness, judging from the frequency with which it has been used, but it has had no discernible effect on business conduct. There is no evidence that producers against whom unconscionability defenses have been successful have removed the offending provisions from their contracts as a result. The reason, presumably, is that *including possibly*

62. See Beh, *supra* note 6, at 1022 (“[U]nconscionability poses only a small threat to the more powerful contracting party because, as a rule, its remedies are feeble and there are few consequences to unconscionable actors and their lawyers.”); Friedman, *supra* note 61, at 331–34 (“[M]ass-market sellers need an incentive to prevent them from engaging in contractual overreaching. Standardized contracting is fraught with the possibility of abuse given the strong likelihood that standardized terms will not be read or understood and the fact that those terms will rarely be subject to negotiation. Occasional nonenforcement or reformation of an overreaching contract or term is an insufficient incentive to sellers to avoid such behavior. *Nonenforcement is a remedy without much bite.*”) (emphasis added and quotations omitted); Korobkin, *Bounded Rationality*, *infra* note 208 and accompanying text; Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845–46 (1988) (“Form documents, offered on a take-it-or-leave-it basis by retailers, manufacturers and landlords, may include unenforceable provisions in a context in which it is likely that the offeror is aware of the unenforceability. An offeror may be tempted to include such terms on the rationale that little may be lost and much might be gained. . . . Unless there is a specific statutory prohibition of the practice which provides an admonitory sanction, there is little to deter the offeror.”); Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL’Y 73, 88 (1999) (“Another drawback of the doctrine of unconscionability is that the remedial value in predatory lending cases is very limited. Courts generally have taken the position that unconscionability cannot be used as a basis for affirmative recovery. Instead, unconscionability may be used only in a defensive posture, allowing the party who purchases on credit to refuse to pay and then use the unconscionability doctrine to fend off a claim by the seller for breach of contract. Consequently, a significant recovery by a victim of predatory lending is unlikely and deterrence is limited.”); Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 16 (2004) (noting the limited deterring effect of unconscionability and proposing more expansive remedies to better deter contractual overreach); Slawson, *Standard Form Contracts*, *supra* note 10, at 531 (“An unfair form will not deter sales because the seller can easily arrange his sales so that few if any buyers will read his forms, whatever their terms, and he risks nothing because the law will treat his forms as contracts anyway.”); Zhou, *supra* note 59, at 139–40 (2010) (“[I]t can be shown that the disincentive under the remedy of invalidation of contract is very moderate relative to the remedy of damages.”).

unconscionable provisions in a contract is a no-lose gamble. The producer gains the advantages the provisions provide if the consumer does not contest them or if the consumer does contest them but the court disagrees, and the producer is no worse off than it would have been if it had not included the provisions if the consumer contests them and the court agrees. The burden is on the consumer to recognize the unconscionability and to convince the court that it is the case, and the producer loses nothing for having tried to enforce the provisions in the first place.⁶³

And as Professor Margaret J. Radin similarly put it in her book *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*:

[E]ven if a firm is less than confident that a court would enforce its clauses if they were challenged, it might reason that the attempt was worth trying: ‘It can’t hurt to stick this in. It might prevent someone from suing us, if indeed someone were to read it. And nothing bad is going to happen to us if we use an unenforceable term. At worst, some court will declare it unenforceable, but it will still probably work against other recipients. Might as well give it a try.’⁶⁴

Conversely, if firms knew that consumers could recover payments already made under unconscionable contracts by asserting the doctrine affirmatively, businesses would be disinclined to overreach in their contract to begin with.⁶⁵

Fortunately, a handful of courts have departed from the majority view by allowing affirmative claims. For example, in *Eva v. Midwest National Mortgage Banc, Inc.*, the district court pointed out that if the only way to challenge contract terms is by asserting unconscionability as a defense, “a party who has entered into an unconscionable contract would have to breach it, get sued, and raise unconscionability as a defense before the Court may examine the enforceability of the contract.”⁶⁶ Moreover, “in the event that the defense of unconscionability

63. W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 143 (1996) (emphasis added).

64. RADIN, *BOILERPLATE*, *supra* note 7, at 13.

65. See James S. Reed, *Legislating for the Consumer: An Insider’s Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 6 (1971) (“[S]ociety cannot allow the wrongdoer to profit without encouraging others to engage in the same type of conduct. In a free enterprise economy, an unethical merchant will use those methods which best ensure him a profit. But if the possibility of profit diminishes because of the existence of practicable legal means of taking the unethical profit from him, his methods will change. The same economic rationale, as well as general ethical principles, dictates that *ill-gotten gains should not be retained*—even if the gain in an individual case is minute.”) (emphasis added).

66. *Eva v. Midwest Nat’l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862, 896 (N.D. Ohio 2001). The *Eva* court also discussed how plaintiffs may affirmatively challenge unconscionable contracts by seeking a declaratory judgment action. *Id.* at 895–96 (“As a general proposition, most matters of defense can be raised affirmatively in a declaratory judgment action, so long as there is an actual controversy between the parties. . . . [O]nce the plaintiff obtains either a declaration that the contract or some of its terms are invalid, or has the contract reformed to eliminate the unconscionable terms, the plaintiff can further request damages to the extent that the unconscionable terms have been enforced in the past.”).

For an unpublished opinion expressly holding that unconscionability may be used as a sword in addition to a shield, see *Buchwald v. Paramount Pictures, Corp.*, No. C 706083 (Cal. Super. Ct. Dec.

is unsuccessful, then the losing party is left to deal with the consequences of the breach which, in this case, may be a monetary judgment in addition to the loss of the home to foreclosure.”⁶⁷ The district court in *Johnson v. Tele-Cash, Inc.* agreed that “[t]here is little merit” to the argument that plaintiffs cannot assert unconscionability affirmatively, since “the court should not require [the plaintiff] to breach his loan agreement in order to become the subject of a lawsuit so that he can then raise the defense of unconscionability.”⁶⁸

The district court in *In re Checking Overdraft Litigation* came to a similar conclusion.⁶⁹ Although the court acknowledged that its ruling was atypical, it nonetheless held that unconscionability can provide an affirmative basis for restitution in certain situations:

Defendants appear to be correct in their assertion that, ordinarily, unconscionability is properly asserted as a defense to a contract rather than an affirmative cause of action. But this is not the ordinary case. An ordinary case in this factual context would be one in which the customer allegedly overdraws his or her account, the bank provides the overdraft service, and then the bank demands payment of the overdraft fee from the customer. Then, when the customer refuses to pay, the bank sues the customer for breach of contract, and the customer at that time can raise an unconscionability defense to the enforcement of the contract. In the instant case, however, the bank is never required to file suit because it is already in possession of the customer’s money, and simply collects the fee by debiting the customer’s account. Thus, the customer never has the opportunity to raise unconscionability as a defense for nonpayment. The only opportunity to do so is through a lawsuit filed by the customer, after payment has been made. Hence, the facts of the instant case weigh in favor of permitting Plaintiffs to pursue an unconscionability claim.⁷⁰

But despite these occasional departures, the majority view remains steadfast in its denial of affirmative claims.⁷¹

Limiting unconscionability to the mere remedy of nonenforcement is plainly inadequate. But what should be done about this? The next section of this note discusses California’s partial solution, the Consumers Legal Remedies Act, and explains how the Act has fallen short of its initial promise.

21, 1990), reprinted in PIERCE O’DONNELL & DENNIS MCDUGAL, FATAL SUBTRACTION: THE INSIDE STORY OF BUCHWALD V. PARAMOUNT PICTURES 541–55, 543 (1992), <https://f002.backblazeb2.com/file/Legal-Scholarship/Unconscionability/Buchwald+v.+Paramount+-+Fatal+Subtraction+Appendix.pdf> [<https://perma.cc/DS5Y-C7FK>] (“Paramount argues that plaintiffs are impermissibly using the doctrine of unconscionability as a ‘sword.’ Paramount claims that Civil Code section 1670.5 . . . permits the doctrine to be utilized only as a ‘shield,’ i.e., by a defendant who has been sued. The Court does not agree.”).

67. *Eva*, 143 F. Supp. 2d at 896.

68. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 278 (D. Del. 1999).

69. *In re Checking Overdraft Litig.*, 694 F. Supp. 2d 1302 (S.D. Fla. 2010).

70. *Id.* at 1318–19.

71. See *supra* note 4 and accompanying text; *infra* note 158 and accompanying text.

III.

CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT: A PARTIAL SOLUTION

California's Consumers Legal Remedies Act (CLRA), one of the State's primary consumer-protection statutes, is a substantial yet incomplete solution to the inequities of an exclusively defensive unconscionability doctrine. The CLRA provides victims of unconscionable contracts with an affirmative cause of action⁷² and access to extensive legal remedies, including attorney's fees.⁷³ Thus, some might assume that the CLRA has overcome the remedial shortcomings of the traditional interpretation of unconscionability in one fell swoop. Consumer advocates have reason to rejoice at the CLRA, but because some courts have interpreted it as excluding certain credit and financial transactions, California debtors have generally not enjoyed the same protections as victims of unconscionable contracts in other industries. Many California borrowers subject to unconscionable credit agreements are therefore left to assert unconscionability only as a defense of last resort *after* a creditor has already sued them. Given the California Supreme Court's admonition that "[p]rotection of unwary consumers from . . . unscrupulous sellers is an exigency of the utmost priority in contemporary society," we can—and *must*—do better.⁷⁴

A. Courts Have Narrowly Interpreted the CLRA to Exclude Credit

The CLRA applies to transactions that involve the "sale or lease of goods or services."⁷⁵ Based on a narrow interpretation of this language, however, some

72. CAL. CIV. CODE § 1770 (2019) ("The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful. . . . (19) Inserting an unconscionable provision in the contract.")

73. CAL. CIV. CODE § 1780(a) ("Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000). (2) An order enjoining the methods, acts, or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief that the court deems proper."). Section 1780(e) further provides that "[t]he court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." Importantly, the CLRA's provision of attorney's fees distinguishes it from California's Unfair Competition Law, which does not so provide.

74. *Vasquez v. Super. Ct.*, 484 P.2d 964, 968 (Cal. 1971).

75. CAL. CIV. CODE § 1770 ("The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful."). *See generally* CAL. CIV. CODE § 1761 ("Definitions: (a) 'Goods' means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property. (b) 'Services' means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods. (c) 'Person' means an individual, partnership, corporation, limited liability company, association, or other group, however organized. (d) 'Consumer' means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes. (e) 'Transaction' means an agreement between a consumer and another

California courts have held that consumer credit falls outside the scope of the CLRA's protections.

In a leading case on the issue, the California Court of Appeal in *Berry v. American Express Publishing, Inc.* held that the extension of credit "separate and apart from a specific purchase or lease of a good or service" does not qualify as a good or service under the CLRA.⁷⁶ The *Berry* court reviewed the issue of the CLRA's application to credit as one of first impression. The plaintiff argued that the credit provided by the defendant constituted "services furnished in connection with the sale . . . of goods," since the credit cardholder "may use the credit provided to purchase goods."⁷⁷ After all, the plaintiff contended, "a consumer cannot hire a car, reserve airline tickets, stay in a hotel, or make purchases on the internet without a credit card."⁷⁸ But the court disagreed, opining that "[a] review of [the] CLRA's legislative history . . . does not support the notion that credit, *separate and apart from a specific purchase or lease of a good or service*, is covered under the act."⁷⁹ The court reasoned that because the California State Legislature removed the terms "money" and "credit" from an earlier draft of the statute, it must have intended that they be exempt from the statute:

Early drafts of section 1761, subdivision (d), defined "Consumer" as "an individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family or household purposes." (Assem. Bill No. 292 (1970 Reg. Sess.) as introduced Jan. 21, 1970.) But the Legislature removed the references to "money" and "credit," before CLRA's enactment, and they do not appear in the current version. The evolution of a proposed statute after its original introduction in the Senate or Assembly can offer considerable enlightenment as to legislative intent. . . . Here, the Legislature's deletion of the terms "money" and "credit" from CLRA's definition of "consumer" strongly counsels us not to stretch the provision to include extensions of credit unrelated to the purchase of any specific good or service.⁸⁰

Although a line of cases before *Berry* interpreted the CLRA to include certain credit and financial transactions,⁸¹ many courts have simply cited *Berry* with no

person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.").

76. *Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229–30 (Cal. Ct. App. 2007) (setting forth the leading case holding that credit is not a "good or service" under the CLRA).

77. *Id.* at 229.

78. *Id.* at 229–30.

79. *Id.* at 230.

80. *Id.* at 230–31.

81. *See, e.g.*, *Knox v. Ameriquest Mortg. Co.*, No. C 05 00240 SC, 2005 WL 1910927, at *4 (N.D. Cal. Aug. 10, 2005) (rejecting argument that the CLRA did not apply to mortgage transactions and finding that "California courts generally find financial transactions to be subject to the CLRA") (citing *Corbett v. Hayward Dodge, Inc.*, 119 Cal. App. 4th 915 (Cal. Ct. App. 2004) (applying CLRA to interest rate on car loan), and *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582 (Cal. 1984) (finding IRA management fees were subject to CLRA)).

original analysis for the contention that credit is broadly excluded under the CLRA.⁸²

On the other hand, some courts have criticized *Berry* or have otherwise construed the CLRA broadly to include certain financial transactions.⁸³ One district court in California expressly chose not to follow *Berry*, since that decision “failed to consider whether . . . a credit card agreement involves *other* services *in addition* to simply an extension of credit.”⁸⁴ In *Jefferson v. Chase Home Finance LLC*, the Northern District of California held that the plaintiffs’ mortgage loans were a covered “service” under the CLRA, since “the transactions . . . involve[d] more than the provision of a loan” and “include[d] financial services.”⁸⁵ The reasoning in *Jefferson* is far from novel. For example, the California Court of Appeal in *Hitz v. First Interstate Bank* similarly held that “credit card agreement[s]” qualified as a service under Civil Code section 1671 because they “encompass[] convenience services in addition to extension of credit.”⁸⁶ Although the *Hitz* court was construing a statute other than the CLRA, some courts have nonetheless cited *Hitz* in concluding that credit card agreements could qualify as a service under the CLRA.⁸⁷ However, the continued vitality of those cases criticizing *Berry* has been called into question by the

82. See, e.g., *Sonoda v. Amerisave Mortg. Corp.*, No. C-11-1803 EMC, 2011 U.S. Dist. LEXIS 73940 (N.D. Cal. July 8, 2011) (citing *Berry* to hold that the plaintiffs’ loans were not “services” under the CLRA because the alleged services were ancillary to the loan itself); *O’Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at *5 (N.D. Cal. June 24, 2009) (citing *Berry* and dismissing CLRA claim challenging defendant’s credit and debit billing practices); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 966 (N.D. Cal. 2007) (citing *Berry* and dismissing CLRA claim that challenged allegedly excessive late fees and overlimit fees); *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353, 1358–59 (N.D. Cal. 2007) (citing *Berry* and dismissing CLRA claim that challenged credit card’s arbitration provision and disclosures of fees); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1175 (E.D. Cal. 2007) (citing *Berry* and dismissing CLRA claim that challenged practice of retroactively increasing credit card interest rates); *Ball v. FleetBoston Fin. Corp.*, 164 Cal. App. 4th 794, 798–99 (2008) (citing *Berry* and affirming denial of leave to amend complaint to add CLRA claim alleging that class-action waiver in credit card agreement was unconscionable).

83. See, e.g., *Hernandez v. Hilltop Fin. Mortg., Inc.*, 622 F. Supp. 2d 842, 849–51 (N.D. Cal. 2007) (applying the CLRA to mortgage lenders because lender offered ancillary services attendant to loan); *Jefferson v. Chase Home Fin. LLC*, No. C06-6510 TEH, 2007 WL 1302984, at *2–3 (N.D. Cal. May 3, 2007) (denying defendant’s motion for summary judgment against CLRA claim based on plaintiff’s theory that a mortgage loan is a financial “service”); *In re Ameriquist Mortg. Co. Mortg. Lending Practices Litig.*, No. 05-CV-7097, 2007 WL 1202544, at *5–6 (N.D. Ill. Apr. 23, 2007) (denying defendant’s motion to dismiss CLRA claim and finding that services connected with residential mortgages may be covered by the CLRA).

84. *Jefferson v. Chase Home Fin. LLC*, 2007 LEXIS 36298, at *9 (N.D. Cal. 2007) (emphasis added).

85. *Id.*

86. *Hitz v. First Interstate Bank*, 38 Cal. App. 4th 274, 286 (Cal. Ct. App. 1995) (emphasis omitted).

87. See, e.g., *In re Ameriquist Mortg. Co. Mortg. Lending Practices Litig.*, 2007 U.S. Dist. LEXIS 29641, at *18-20 (denying defendant’s motion to dismiss plaintiffs CLRA claim, concluding that “it is not inconceivable that, consistent with the allegations of the complaint, plaintiffs could prove the existence of tangential ‘services’ associated with their residential mortgages and establish that these transactions were covered by the CLRA”).

California Supreme Court's 2009 ruling in *Fairbanks v. Superior Court* that a life insurance transaction did not qualify as a "good" or "service" under the CLRA.⁸⁸

Despite courts occasionally holding that certain credit agreements fall under the CLRA, many forms of credit remain exempt from the statute. For example, in contrast to the revolving credit in *Jefferson*, installment loans provide a lump sum to consumers in a one-time payment.⁸⁹ Courts have found that the closed-end nature of such credit does not involve the types of "convenience services" that revolving credit does.⁹⁰ Thus, hundreds of thousands of California debtors subject to oppressive credit terms remain powerless to assert the CLRA's important protections.

But perhaps nowhere is the protection against unconscionable contracts more important than in the consumer-credit market, where unfavorable terms can have uniquely debilitating and lasting impacts on consumers' lives. Indeed, the United Nations Guidelines for Consumer Protection, to which the United States is a signatory, provides that member states should protect consumers "from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts *and unconscionable conditions of credit* by sellers."⁹¹ The authors of the Uniform Consumer Credit Code have come to a similar conclusion, even equipping consumers with an affirmative cause of action to recover damages and attorney's fees against unconscionable credit terms.⁹²

88. *Fairbanks v. Super. Ct.*, 46 Cal. 4th 56, 61 (Cal. 2009) ("[A] contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel.").

89. See generally NAT'L CONSUMER LAW CTR., *INSTALLMENT LOANS: WILL STATES PROTECT BORROWERS FROM A NEW WAVE OF PREDATORY LENDING?* (2015), <https://www.nclc.org/images/pdf/pr-reports/report-installment-loans.pdf> [<https://perma.cc/RTV6-FFT7>] (presenting a detailed analysis of consumer installment loans).

90. See, e.g., *O'Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at *5 (N.D. Cal. June 24, 2009) ("Plaintiffs' CLRA claim [challenging installment loans as unconscionable] is dismissed with leave to amend to include additional services that may have been provided in connection with the loan.").

91. UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION, Guideline #26 (2016) (emphasis added), http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf [<https://perma.cc/FXN3-FCBY>].

92. UNIF. CONSUMER CREDIT CODE § 5.108, *Unconscionability; Inducement by Unconscionable Conduct; Unconscionable Debt Collection* 179 cmt.5 (1974) ("[S]ubsection (6) authorizes an award of reasonable attorneys fees to the successful consumer or debtor."); <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7e19c3bc-ba1a-a3ba-ef77-f9c9e1f57bd1> [<https://perma.cc/E4NX-C69J>]; *id.* § 5.201(2) *Consumer Remedies*, at 189–90 ("A consumer is not obligated to pay a charge in excess of that allowed by this Act and has a right of refund of any excess charge paid. . . . If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against consumers arising from the debt."); *id.* § 6.111 *Injunctions Against Unconscionable Agreements and Fraudulent or Unconscionable Conduct Including Debt Collection*, at 211 cmt.1 ("Section 5.108 provides a private remedy for unconscionable conduct."); *id.* § 6.113, at 213 cmt.1 ("This Act explicitly grants a right of action to a consumer to recover actual

Why, then, has California failed to protect its debtors from unconscionable credit agreements? For a court to deny such an important consumer protection, one would think that the legislative history must unambiguously reveal that the CLRA was not intended to apply to credit and financial transactions. Indeed, the court in *Berry* relied heavily on the CLRA's legislative history in finding that the CLRA did not apply to the plaintiffs' credit card accounts.⁹³ Nevertheless, a deeper look into the historical circumstances surrounding the CLRA suggests that its drafters likely never intended today's broad exemption of credit and financial services.

B. The Exclusion of Financial Services from the CLRA Is Inconsistent with the Statute's Broad Consumer Protection Mandate

Despite courts' narrow interpretation of the CLRA, the statute's historical background reveals an unambiguous intent to provide broad legal protections and remedies to low-income consumers. California enacted the CLRA in 1970 in response to the proliferation of unconscionable business practices targeting low-income and minority communities.⁹⁴ The CLRA's legislative history demonstrates, in fact, that the legislation was a direct response to the 1969 National Advisory Commission on Civil Disorders ("Kerner Report"), which detailed the numerous ways in which merchants exploited low-income

damages and a penalty for the violation of numerous of its provisions."); *id.* § 6.115, at 215 cmt.1 ("[T]he individual consumer has a cause of action under Section 5.201(2) and (3) to recover any charges in excess of those permitted in the Act and to recover a penalty in certain cases . . ."). Eleven states have enacted the Uniform Consumer Credit Code: Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming. For more commentary on the Uniform Consumer Credit Code, see generally Barbara A. Curran & David I. Fand, *An Analysis of the Uniform Consumer Credit Code*, 49 NEB. L. REV. 727 (1970); Jack L. Curtin, *Unconscionability under the Uniform Consumer Credit Code in Light of Section 2-302*, 9 IDAHO L. REV. 28 (1972).

93. *Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229–31 (Cal. Ct. App. 2007).

94. See Reed, *supra* note 65, at 8; see also DAVID CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES (1963); REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER REPORT].

consumers,⁹⁵ including through oppressive financial and credit transactions.⁹⁶ The report found that those who live in low-income neighborhoods experience “grievous exploitation by vendors using such devices as high pressure salesmanship, bait advertising, misrepresentation of prices, *exorbitant prices and credit charges*, and sale of shoddy merchandise.”⁹⁷ Moreover, a year before the Kerner Report, Congress passed the historic Truth in Lending Act, indicating the salience of consumer-credit reform in the public discourse at the time of the CLRA’s passage.⁹⁸ It is hard to imagine that the drafters would have intended to exclude consumer credit when faced with such historic levels of public attention to and support for consumer-credit reform.

The legislative intent behind the CLRA is further clarified by the Act’s policy statement, which explicitly instructs courts to “liberally construe[]” the Act to protect consumers.⁹⁹ Former Chief Counsel of the California Assembly Judiciary Committee James S. Reed, who was intimately involved in the drafting and enactment of the CLRA, argues that section 1760’s statement of legislative policy “is of critical importance for an adequate understanding of the Consumers Legal Remedies Act,” and “is the basic thread that ties together the numerous provisions of the Act. Strict adherence to this legislative intent by the courts is strongly urged, for without such adherence the Act will not provide that degree of consumer protection intended by the legislature.”¹⁰⁰ According to Reed, the

95. See *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1077 (Cal. 1999) (“The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices, which were identified in the 1969 Report of the National Advisory Commission on Civil Disorders”); Hester, *supra* note 33, at 831 (“[T]he President’s Commission on Civil Disorders found that the ill will and frustration engendered by unconscionable practices has been a contributing cause of riots in the poverty areas of American Cities.”). The CLRA’s primary author, Assemblyman James A. Hayes, described the impetus behind the Act in a similar manner, explaining:

The Report of the National Advisory Commission on Civil Disorders found unethical and deceptive practices of merchants in low income areas to be factors contributing to the disturbances in our cities in recent years. This bill gives citizens in those areas the right to seek redress in the courts as individuals, without having to ask the government—state or federal—for assistance. It is my opinion and desire that legislation of this type will have a substantial deterrent effect as to the deceptive practices it makes unlawful, and that it will, as a result, aid in establishing better relations between the businessman and the consumer.

96. See KERNER REPORT, *supra* note 94, at 274–75; Reed, *supra* note 94, at 6 (“The necessitous consumer with limited options and a poor credit history can be induced to buy by even the most disreputable merchant. When he does buy and cannot make payments, trouble begins. An unpaid or delinquent debt will be ruthlessly enforced by some merchants or, more often, their assignees.”).

97. *Vasquez v. Super. Ct.*, 484 P.2d 964, 968 (Cal. 1971) (emphasis added).

98. See generally Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807 (2003).

99. See CAL. CIV. CODE § 1760 (2019) (“This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.”).

100. Reed, *supra* note 94, at 8. Reed’s article is “considered one of the primary sources for the history and interpretation of the CLRA. It has been repeatedly cited by California appellate courts when discussing the meaning and intent of the CLRA.” See Cheryl Lee Johnson, *The History and Origins of the Consumers Legal Remedies Act*, in CAL. ANTI. & UNFAIR COMP. L. § 19.02 (2014).

drafters of the CLRA used the legislative policy statement to send a clear message: “when in doubt, decide in the consumers’ favor.”¹⁰¹

Given the CLRA’s expressly pro-consumer policy statement, courts should fulfill the statute’s purpose by construing any ambiguities in consumers’ favor. However, not all courts have done so. Instead, courts’ narrow reading of the CLRA has created an enduring obstacle for debtors seeking the statute’s protection.

Nevertheless, consumers should seek to more fully explore and expand the outer bounds of the CLRA’s application to financial transactions by invoking cases like *Jefferson v. Chase Home Finance LLC*.¹⁰² But despite courts’ occasional willingness to subject certain forms of credit to the CLRA, California legislators should eliminate the ambiguity once and for all by amending the statute to explicitly cover the extension of credit. By doing so, the Legislature will enable California debtors to use the CLRA’s incorporation of the unconscionability doctrine as an affirmative cause of action to seek relief against unconscionable credit terms. Until then, however, debtors may invoke the protection of the State’s Unfair Competition Law by asserting a long-overlooked legal theory recently confirmed by the California Supreme Court.¹⁰³

IV.

A SWORD AT LAST: UNCONSCIONABILITY AS UNFAIR COMPETITION

Although plaintiffs have pleaded affirmative unconscionability claims under the CLRA for decades, a recent decision by the California Supreme Court has opened a new door for consumers—including those debtors excluded by the CLRA—to plead affirmative unconscionability claims under the State’s unfair-competition statute. This Part presents this novel legal theory and discusses the recent landmark California Supreme Court case that confirms its validity, *De La Torre v. CashCall, Inc.*¹⁰⁴

California’s Unfair Competition Law (UCL) provides plaintiffs with an affirmative cause of action to seek equitable remedies¹⁰⁵ against business acts and practices that are (1) unlawful, (2) unfair, or (3) fraudulent.¹⁰⁶ Because each of these prongs establishes “a separate and distinct theory of liability,” a plaintiff

101. Reed, *supra* note 94, at 8 (emphasis omitted).

102. See generally *supra* notes 84–85 and accompanying text.

103. See *infra* Part IV; *infra* notes 127–129.

104. 422 P.3d 1004 (Cal. 2018).

105. The UCL provides for restitution and injunctive relief. CAL. BUS. & PROF. CODE § 17203 (2019). Unlike the CLRA, however, the UCL does not provide for attorney’s fees. *Id.*

106. CAL. BUS. & PROF. CODE § 17200 *et seq.* Although this note focuses on pleading unconscionability under the UCL’s *unlawful* prong, plaintiffs can also plead unconscionability under the *unfairness* prong. See *infra* note 134 and accompanying text. Indeed, it seems undeniable that unconscionability contains an inherent element of unfairness by its very nature. See RESTATEMENT OF CONSUMER CONTRACTS, § 5 *Unconscionability*, at 74 (ALI Council Discussion Draft No. 4, 2017) (“Importantly, substantive unconscionability is closely related to the standard of ‘unfairness’ under FTC law.”).

need only prove one of these elements to succeed in a UCL claim.¹⁰⁷ This Note focuses on the unlawful prong to explain how plaintiffs can bring an affirmative unconscionability claim under the UCL.

The UCL's unlawful prong is uniquely broad. A business practice is unlawful under the UCL "if it is proscribed by some constitutional, statutory, regulatory, common law,¹⁰⁸ or other determinable legal standard."¹⁰⁹ In other words, the UCL allows plaintiffs to "borrow[] violations of other laws" and assert those violations as "independently actionable."¹¹⁰ Even if the underlying predicate violation does not provide a private right of action, plaintiffs may nonetheless seek the remedies provided in the UCL.¹¹¹

Unconscionable contracts are unlawful under California law.¹¹² In 1979, the California Legislature copied the Uniform Commercial Code's unconscionability provision verbatim and incorporated it into Civil Code § 1670.5.¹¹³ The portion of the Civil Code that houses this provision, Title 4, is

107. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007).

108. *See, e.g., CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1107 (9th Cir. 2007) (finding that the plaintiff adequately stated an affirmative claim under the UCL's unlawful prong based on violations of various common law rules); *Nat'l Rural Telecomms. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074–75 (C.D. Cal. 2003) (holding that a violation of common law can support a UCL claim, provided that the conduct is also unlawful, unfair, or fraudulent under the common law); *Bondanza v. Peninsula Hosp. & Med. Ctr.*, 590 P.2d 22, 27 (Cal. 1979) (holding that business practices that violate common law rules adopted by prior court decisions will satisfy the UCL's unlawful prong, even if the rules at issue had never been codified); *see also* William Stern, *First Substantive Prong of § 17200—What is an "Unlawful" Business Practice?*, in CALIFORNIA PRACTICE GUIDE – BUS. & PROF. C. 17200, CH. 3-F (West Rutter Group 2018) ("Virtually any law or regulation—federal or state, statutory or common law—can serve as predicate for a § 17200 'unlawful' violation. Thus, if a 'business practice' violates any law—literally—it also violates § 17200 and may be redressed under that section.") (emphasis added). *But see* *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1043–44 (9th Cir. 2010) ("In his complaint, [Plaintiff] alleged that New Cingular violated the common law of unfair competition and breached his contract. These practices alone do not amount to a violation of the 'unlawful' prong of § 17200; [Plaintiff] must also allege that New Cingular engaged in a business practice 'forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.' In other words, a common law violation such as breach of contract is insufficient.") (citations omitted).

109. *CRST Van Expedited Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1107–09 (9th Cir. 2007) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (Cal. 2003)).

110. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999).

111. *See De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1010 (Cal. 2018); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086 (Cal. 1998).

112. CAL. CIV. CODE § 1670.5 (2019) (declaring unconscionable contracts unlawful); *see also* Letter From Assemblyman Jack R. Fenton, *supra* note 46, and accompanying text (declaring the drafters' intent that unconscionable contracts be unlawful).

113. *Id.*; *see also* UNIFORM COM. CODE § 2–302. For an exhaustive chronological history behind California's incorporation of unconscionability into statute, *see generally* *Comments, A Reevaluation of the Decision Not to Adopt the Unconscionability Provision of The Uniform Commercial Code in California*, 7 SAN DIEGO L. REV. 289 (1970); Peter D. Roos, *The Doctrine of Unconscionability: Alive and Well in California*, 9 CAL. W. L. REV. 100, 101 (1972) (detailing "the early [unconscionability] case law and the legislative history behind the [initial] failures to adopt Section 2-302"); Charles H. Hurd & Phillip L. Bush, *Unconscionability in California: A Matter of Conscience for California Consumers*, 25 HASTINGS L.J. 1, 2 n.5 (1973) (discussing the repeated failed legislative attempts to incorporate

entitled “Unlawful Contracts.”¹¹⁴ The State Legislature has also incorporated the unconscionability doctrine into other statutory provisions, such as section 1770(19) of the CLRA and section 22302 of the California Financial Code,¹¹⁵ which regulates consumer lending in the State.

Thus, plaintiffs can—and should—use these statutory unconscionability provisions as predicate violations setting forth an independent cause of action under the UCL’s unlawful prong. While consumers have successfully used the CLRA’s unconscionability provision in this manner, they have largely failed to use the California Civil and Financial Codes’ unconscionability provisions as UCL predicates. Indeed, plaintiffs confidently assuming the success of their CLRA claim often fail to also plead violations of the Civil and Financial Codes as backup UCL predicates.¹¹⁶ It may not be apparent why this failure would be problematic. After all, plaintiffs may think to themselves, if a violation of the CLRA already triggers the UCL’s unlawful prong, why bother searching for additional UCL predicates?

But by failing to plead violations of the Civil and Financial Codes, plaintiffs unnecessarily weaken their UCL claim by leaving it entirely dependent on the success of the CLRA claim.¹¹⁷ In other words, if the CLRA claim fails for some unexpected reason, so too will the UCL claim. This is precisely what occurred in *Lozano v. AT&T Wireless*.¹¹⁸ The plaintiffs in *Lozano* alleged a violation of the CLRA’s unconscionability provision.¹¹⁹ The plaintiffs then used this alleged CLRA violation to assert a claim under the UCL’s unlawful prong.¹²⁰ Although the Civil Code’s unconscionability provision undoubtedly applied to the contract at issue,¹²¹ the plaintiffs failed to use the Civil Code as a backup UCL predicate. This was a major oversight. After first dismissing the plaintiffs’ CLRA claim, the court in turn dismissed the UCL claim, “as it [was] dependent on [the] CLRA claim.”¹²² Had the plaintiffs also based their UCL claim on a violation of the Civil Code, their UCL claim could have lived to fight another day.

unconscionability into California statute during the early 1970s); Prince, *supra* note 6, at 464–65, 491–92 (1995) (discussing the history of California’s ultimate adoption of the unconscionability doctrine into statute).

114. CAL. CIV. CODE §§ 1667–1670.11.

115. CAL. FIN. CODE § 22302 (2019).

116. *See, e.g., Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007).

117. *See, e.g., Id.* at 737.

118. *Id.*

119. *Id.* at 730.

120. *Id.*

121. *Carboni v. Arrospide*, 2 Cal. App. 4th 76 (Cal. Ct. App. 1991) (noting that § 1670.5 “applies to all contracts”) (citing *Perdue v. Crocker Nat’l Bank*, 38 Cal. 3d 913, 925 fn.10 (Cal. 1985); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 485 (Cal. Ct. App. 1982)) (emphasis omitted); *Shadoan v. World Savings & Loan Assn.*, 219 Cal. App. 3d 97, 110 fn.1 (Cal. Ct. App. 1990) (explaining how the legislature intentionally adopted the unconscionability doctrine “so that its provisions would be applicable to *all* contractual obligations”) (citing Legislative Committee comment to § 1670.5).

122. *Lozano*, 504 F.3d 718; *supra* note 117 accompanying text.

Invoking the Civil and Financial Codes' unconscionability provisions as a UCL predicate also opens the door to new claims that would be entirely barred under the CLRA. The unconscionability provisions in the Civil and Financial Codes apply to sectors of the economy that exceed the reach of the CLRA.¹²³ For example, the Financial Code expressly applies the unconscionability doctrine to the same consumer loans that some courts have held to be exempt from the CLRA.¹²⁴ Section 22302(a) of the Financial Code states that the Civil Code's unconscionability provision "applies to the provisions of a loan contract that is subject to this division."¹²⁵ Subsection (b) further provides that "[a] loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be *in violation* of this division"¹²⁶ Because the UCL's unlawful prong borrows violations of other laws and treats them as independently actionable, it stands to reason that California debtors may use a violation of the Financial Code's unconscionability provision to bring an affirmative UCL claim.

Indeed, in its recent landmark opinion in *De La Torre v. CashCall, Inc.*, the California Supreme Court unanimously confirmed this precise legal theory for the very first time.¹²⁷ The defendant in *CashCall*, a sub-prime lender whose interest rates ranged from 95 to 135 percent, argued that Financial Code 22303 and Civil Code 1670.5 "merely codif[y] the *defense* of unconscionability without providing for an affirmative cause of action."¹²⁸ But the court rightly observed that the plaintiffs' claim was brought not under the statutory unconscionability provisions themselves but under the UCL:

In this case, section 22302 supplies the requisite "violations of other laws" by making "[a] loan found to be unconscionable" a violation of the Financing Law. The UCL, in turn, makes that violation "independently actionable." So the fact that section 22302 does not provide for a private cause of action is immaterial since it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs "specific power" to prosecute unfair competition claims.¹²⁹

The court therefore came to the logical, yet elusive, conclusion that violations of the Financial Code's unconscionability provision trigger the UCL's unlawful prong.

123. See generally *supra* Part III discussing the scope of the Consumers Legal Remedies Act.

124. CAL. FIN. CODE § 22302 (2019).

125. *Id.* § 22302(a).

126. *Id.* § 22302(b) (emphasis added).

127. *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1010 (Cal. 2018) ("[W]e conclude plaintiffs have indeed stated a cause of action in this litigation by bringing an unfair competition claim that alleges a violation of section 22302 due to an unconscionably high interest rate. To arrive at this conclusion, we consider the Financial Code, the UCL, and the unconscionability doctrine itself.>").

128. *Id.* at 1012 (emphasis added).

129. *Id.* (citations and quotations omitted); accord *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tele. Co.*, 20 Cal. 4th 163, 180 (Cal. 2009) (applying the UCL's unlawful prong).

The decision in *CashCall* is the first time that the California Supreme Court has expressly held that unconscionability can be asserted affirmatively under the UCL's unlawful prong. Although a handful of lower courts arrived at the same conclusion before *CashCall*, these cases did not squarely resolve the issue.¹³⁰ Despite these earlier cases, the viability of this theory has remained a contentious and highly litigated issue in the absence of a definitive answer from the California Supreme Court.¹³¹ Indeed, the validity of this legal theory has been one of the centrally litigated issues during *CashCall*'s progression throughout various courts over the years.¹³² The clarity brought by the court's milestone opinion in *CashCall* therefore constitutes a substantial win for California consumers.

The clarity of bringing a claim under the UCL's unlawful prong stands in stark contrast to the confusion of bringing a claim under its unfairness prong. While some lower courts indicated before *CashCall* that unconscionability could factor into a UCL claim under the *unfairness* prong, these cases are far from clear or uniform. Some courts have assumed this holding simply for the sake of argument, only to decide the case on other grounds,¹³³ while others have sown

130. See, e.g., *Zanze v. Snelling Servs., LLC*, 412 F. App'x 994, 996–97 (9th Cir. 2011) (“Zanze’s allegation that the forfeiture clauses were unconscionable provides an adequate basis for an unfair practices claim under the UCL. Conduct that is deemed lawful cannot be the basis of a UCL claim, even if that conduct might otherwise be considered unfair. Forfeiture clauses like the ones at issue have been found lawful. However . . . such forfeiture clauses have not been held lawful where they are unconscionable. Because Zanze specifically alleged that the forfeiture clauses at issue were unconscionable, he has stated a claim for unfair business practices.”) (citations omitted); *Util. Consumers’ Action Network v. Sprint Sol., Inc.*, No. C07–CV–2231–W (RJB), 2008 WL 1946859, at *2 (S.D. Cal. Apr. 25, 2008) (“A claim for unlawful business act or practice could *conceivably* be based upon the unconscionability section of the California Civil Code.”) (emphasis added); *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1013 (2016) (concluding that plaintiff “alleged an actionable unlawful or unfair business practice” against defendant’s enforcement of unconscionable loan), *reh’g denied* (Mar. 11, 2016), *as modified* (Mar. 11, 2016). While the court in *Utility Consumers’ Action Network v. Sprint Solutions* denied the defendant’s “motion to strike Cal. Civ. Code § 1670.5 as a basis for a claim of unlawful business act or practice,” note that the court did not expressly confirm the plaintiff’s legal theory. *Util. Consumers Action Network*, 2008 WL 1946859 at *9.

131. See, e.g., *De La Torre v. CashCall, Inc.*, 854 F.3d 1082, 1087 (9th Cir. 2017) (“CashCall contends that *Carboni* only recognized unconscionability as a defense to a suit by a lender, not an affirmative UCL action for restitution.”).

132. *Id.*; see also Defendant’s Motion on Summary Judgment on Unconscionability Claim at 9, *O’Donovan v. CashCall, Inc.*, 2013 WL 11264502 (N.D. Cal. 2013) (No. 3:08-cv-03174-MEJ) (“Unconscionability is a defense to the enforcement of a contract, not an affirmative claim. . . . [T]he doctrine of unconscionability was never intended to allow a party to rewrite contractual terms or change the interest rate for an entire putative class.”).

133. See, e.g., *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1540 (Cal. Ct. App. 2003) (“[T]here is no cause of action for unconscionability under section 1670.5; that doctrine is only a defense to contract enforcement. Nevertheless, the *California Grocers* case assumed for purposes of discussion that California’s unfair competition statute may create an affirmative cause of action for unconscionability. . . . We need not decide whether Business and Professions Code section 17200 creates such a cause of action, because, even were we to assume that it does, Jones still fails to show unconscionability.”) (citations omitted); *Cal. Grocers Ass’n v. Bank of America*, 22 Cal. App. 4th 205, 217 (Cal. Ct. App. 1994) (“The statutory law of unfair competition, on which the present judgment is based, includes no . . . express authorization of an affirmative cause of action for unconscionability. The

confusion by blurring the line between the UCL's "unfair" and "unlawful" prongs.¹³⁴ Moreover, California courts have formulated three different definitions of "unfair" under the UCL—a three-way split in authority that creates additional uncertainty for plaintiffs who invoke unconscionability under the unfairness prong.¹³⁵

The unfairness prong's viability as a vehicle for unconscionability claims is further complicated by the safe harbor doctrine, which holds that a practice cannot be unfair under the UCL if "specific legislation" authorizes businesses to engage in the challenged practice.¹³⁶ To use *CashCall* as an example, a lender could argue that, by removing interest-rate caps on loans above \$2,500, the California Legislature created a safe harbor authorizing creditors to charge any amount of interest without fear of consumers challenging the rates as "unfair."¹³⁷ Pleading unconscionability under the *unlawful* prong may bypass such obstacles, since the safe harbor doctrine has only been held to apply to the unfairness

law does, however, generally prohibit an 'unfair' business practice, which 'may be enjoined in any court of competent jurisdiction.' Does this encompass an affirmative cause of action for unconscionability? We need not decide. Assuming the answer is yes, as is suggested by the Legislature's broad grant of remedial power, the authority to grant injunctive relief is still discretionary, and we conclude that the court in the present case abused such discretion.") (citations omitted).

134. See, e.g., *Brecher v. Citigroup Glob. Mkts., Inc.*, No. 3:09—cv—1344 AJB (MDD), 2011 WL 3475299, at *7 (S.D. Cal. 2011) ("Defendants argue that unconscionability is nothing more than an ordinary common law breach of contract claim, which cannot violate the UCL. That standard, however, applies to 'unlawful' acts, not 'unfair' acts. Plaintiffs plead 'unfair' acts, and 'unfair simply means any practice whose harm to the victim outweighs its benefits. Plaintiffs allege that the practice . . . is unconscionable. An unconscionable provision is certainly 'unfair.' While some cancellation provisions have been found to be lawful, other have been held unlawful where they are unconscionable. Because the cancellation provision could be unconscionable, it could be unfair under the UCL, and therefore Plaintiffs have sufficiently stated a claim under the UCL.") (citations omitted); *Shadoan v. World Sav. & Loan Ass'n*, 219 Cal. App. 3d 97, 101–02 (Cal. Ct. App. 1990) ("[T]hat a contractual provision is unconscionable may be relevant to the question of whether a party who drafted—and seeks to enforce—the provision, has committed an unfair business practice.").

135. For a summary of the split in authority over the definition of "unfairness" under the UCL, see *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806 (Cal. Ct. App. 2013) (citing *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (Cal. Ct. App. 2006) ("An act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided."); *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 719 (Cal. Ct. App. 2001) ("[A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'"); *Scripps Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 940 (Cal. Ct. App. 2003) ("An unfair business practice means 'the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions.'").

136. See *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999) ("[C]ourts may not use the [UCL] to condemn actions the Legislature permits."); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 (9th Cir. 2011).

137. See, e.g., *De La Torre v. CashCall, Inc.*, 854 F.3d 1082, 1087 (9th Cir. 2017) (discussing the defendant lender's "safe harbor" argument as applied to interest rates).

prong.¹³⁸ While far from insurmountable, the unfairness prong's complications leave the unlawful prong standing tall as a superior vehicle for an affirmative unconscionability claim under the UCL.

The court's ruling in *CashCall* confirms once and for all that, even where the CLRA does not apply, the UCL's unlawful prong transforms the doctrine of unconscionability from a defensive shield into an offensive sword. While this holding comprised only a small portion of the court's opinion,¹³⁹ its significance for California debtors should not be overlooked. For years, the CLRA has shut the courthouse doors to debtors seeking refuge from unconscionable credit terms.¹⁴⁰ By affirming the Financial Code's unconscionability provision as a viable UCL predicate, the *CashCall* opinion has at last opened these doors to debtors long forsaken by the CLRA. Armed with this newfound sword of unconscionability, California debtors should promptly break themselves free from the shackles of oppressive credit by seeking the equitable remedies available under the UCL.

But the implications of *CashCall* far exceed the realm of consumer credit. Hidden beneath a single inferential step lies an implied confirmation of the powerful legal theory that allows consumers to use the *Civil Code*'s far-reaching unconscionability provision as a UCL predicate for a host of consumer transactions.¹⁴¹ Although the court did not expressly state that the *Civil Code*'s unconscionability provision could trigger a UCL claim, the court's reasoning leaves little room for any other conclusion.¹⁴² Indeed, the only reason why the

138. See *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1017 (Cal. 2018) (assuming for sake of argument that the safe harbor doctrine could apply “to a UCL action premised on an unlawful, rather than unfair, business practice,” only to reject the defense).

139. The primary issue resolved by the court in *CashCall* was whether an interest rate may render a loan unconscionable even in the absence of a governing statutory interest rate cap. See *De La Torre v. CashCall, Inc.*, 854 F.3d 1082, 1087 (9th Cir. 2017) (certifying this question to the California Supreme Court). The California Supreme Court held that it could, so long as a court does not consider the interest rate in isolation, but rather in the “totality of the circumstances” surrounding the loan. *CashCall*, 422 P.3d at 1008. See generally Brief of Amici Curiae Center for Responsible Lending, National Association of Consumer Advocates, Public Citizen, Inc., and Public Good Law Center, in Support of Appellants, *CashCall*, 422 P.3d 1004, 2018 WL 1399887, <http://www.courts.ca.gov/documents/8-s241434-ac-center-responsible-lending-et-al-021418.pdf> [<https://perma.cc/72EB-F2YT>].

140. See *supra* Part III.

141. Theoretically, consumers could likely even assert unconscionability under the UCL without invoking *any* of California's statutory unconscionability provisions. Because violations of *common law* rules also trigger the UCL's unlawful prong, see *supra* note 108, and because courts possess an inherent equitable power to declare contracts unconscionable under the common law even absent statutory authorization, see *infra* notes 151–154, plaintiffs could likely invoke the common law doctrine of unconscionability as a predicate violation triggering the UCL's unlawful prong. Cf. *supra* notes 108–109 and accompanying text; *infra* notes 150–154 and accompanying text. But see *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1043–44 (9th Cir. 2010) (holding that “a common law violation such as breach of contract is insufficient” to trigger the UCL's unlawful prong). However, this may prove unnecessary as a practical matter, since Civil Code § 1670.5 already applies to *all* contracts and would therefore already supply a UCL predicate. See *supra* note 121 and accompanying text (presenting case law holding that Civil Code § 1670.5 applies to all contracts).

142. See *CashCall*, 422 P.3d at 1012.

court did not so hold in *CashCall* was because the specific statute at issue, the Financial Code, already expressly incorporated the Civil Code provision.¹⁴³ But even if the Financial Code contained no such provision, there is no reason why the court's holding should not equally apply to the Civil Code. Far from a stretch of the imagination, this conclusion is arguably a logical certainty—after all, Civil Code 1670.5 not only applies to “all contracts”¹⁴⁴ but also expressly declares unconscionable contracts unlawful by including them among the contracts deemed “unlawful” by Title 4 of the Civil Code.¹⁴⁵ The true stretch of the imagination would be to assume that enforcing an “unlawful contract” would somehow not constitute an “unlawful” act under the UCL.¹⁴⁶ Given the breadth of the UCL and Civil Code § 1670.5,¹⁴⁷ it is hard to overstate the power of this dormant legal theory.

In short, the California Supreme Court's opinion in *De La Torre v. CashCall, Inc.* is a watershed moment for more reasons than one. The court's express confirmation that debtors may invoke the Financial Code to bring an affirmative unconscionability claim under the UCL is undoubtedly a historic triumph for debtors statewide. But the victory does not stop with the Financial Code. To maximize *CashCall's* impact, consumers must seize the subtleties of the court's reasoning and push the UCL's traditional boundaries to unexplored territory. Consumers should apply the court's holding not only to the Financial Code but also to the far more consequential unconscionability provision in the Civil Code. Moreover, out-of-state observers should look to replicate this theory in their own states if they likewise enjoy a broad statutory unconscionability provision and an unfair-competition statute with an analogous “per se violation” prong.¹⁴⁸ By doing so, consumers would usher in a new era of unconscionability jurisprudence—an era in which, no matter the industry, consumers may brandish a sword of unconscionability to strike at defendants' ill-gotten gains.

143. See *id.* (“Nor does it help CashCall to argue that Civil Code section 1670.5 merely codifies the defense of unconscionability without providing for an affirmative cause of action. Whatever merit underlies the claim, it proves irrelevant where a different statute—here, section 22302—expressly provides that an unconscionable loan breaks the law and the UCL supplies a cause of action to police such unlawful conduct.”).

144. See *supra* note 121 and accompanying text.

145. See CAL. CIV. CODE § 1667–70.11 (2019); CAL. CIV. CODE § 1670.5 (declaring unconscionable contracts unlawful).

146. See CAL. CIV. CODE § 1670.5; *supra* note 109 and accompanying text.

147. See *supra* note 121 and accompanying text (presenting case law holding that Civil Code § 1670.5 applies to all contracts).

148. For more on analogous unfair competition statutes, see Matthew W. Sawchak, *Refining Per Se Unfair Trade Practices*, 92 N.C. L. REV. 1881, 1885 n.11 (2014) (presenting the nationwide literature on analogous “per se violations” in other states' unfair-competition laws).

V.

INVOKING COURTS' EQUITABLE DISCRETION TO FURNISH A SWORD UNDER THE COMMON LAW

Although the UCL—and in some instances the CLRA—allows Californians to assert unconscionability affirmatively, not all states enjoy such broad consumer-protection statutes.¹⁴⁹ Fortunately, long-standing principles of equity authorize courts to intervene where statutes and strict common law rules fall short.¹⁵⁰

Even absent statutory authorization, courts nonetheless retain an “inherent equitable power”¹⁵¹ to declare a contract unconscionable under the common law.¹⁵² Although Civil Code § 1670.5 codified the equitable doctrine of unconscionability into statutory law, the statute’s legislative history shows that the provision was considered “a restatement of the broad equity powers which the California courts have always assumed they held.”¹⁵³ Indeed, the California

149. See, e.g., James O. Lattner, *Illinois Should Explicitly Adopt the Per Se Rule for Consumer Fraud Act Violations*, 2 LOY. CONSUMER L. REV. 64 (1990); see also Sawchak, *supra* note 148 and accompanying text.

150. See, e.g., *Discover Bank v. Owens*, 822 N.E.2d 869, 874 (Ohio Mun. Ct. Clev. 2004) (“The function of equity is to supplement the law where it is insufficient, moderating the unjust results that would follow from the unbending application of the law”) (citing *Salem Iron Co. v. Hyland*, 77 N.E. 751 (Ohio 1906)); see also Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 890 (1999) (“Equity supplements the common law; its rules do not contradict the common law; rather, they aim at securing substantial justice when the strict rule of common law might work hardship.”) (quotations and citations omitted); *infra* notes 153, 168, 185–190 and accompanying text (discussing the flexibility of equity).

151. *State ex. rel. King v. B&B Inv. Grp.*, 329 P.3d 658, 670 (N.M. 2014) (“Ruling on substantive unconscionability is an inherent equitable power of the court, and does not require prior legislative action.”).

152. See, e.g., *James v. Nat’l Fin., L.L.C.*, 132 A.3d 799 (Del. Ch. 2016) (applying common law unconscionability doctrine to find a consumer loan with an interest rate of 835 percent procedurally and substantively unconscionable); see also *Perdue v. Crocker Nat’l Bank*, 38 Cal. 3d 913, 925 (Cal. 1985) (explaining that Civil Code § 1670.5 simply codified “the established doctrine” of unconscionability that already existed in the common law); *Carboni v. Arrospeide*, 2 Cal. App. 4th 76, 81 (Cal. Ct. App. 1991) (noting that before the incorporation of unconscionability into Civil Code 1670.5, “California courts long recognized ‘unconscionability’ as a viable common law doctrine *even in the absence of specific statutory authority*”) (emphasis added); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 484 (Cal. Ct. App. 1982) (“Unconscionability has long been recognized as a common law doctrine which has been consistently applied by California courts in the absence of specific statutory authorization.”); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 461 (Utah 1983) (“Although the unconscionability provisions of neither the U.C.C. nor the [statute] are applicable to the transactions at issue . . . unconscionability is nevertheless recognizable at common law.”) (emphasis added); *Houghton v. Page*, 2 N.H. 42, 44 (N.H. 1819) (“Contracts . . . may be void at common law, because unconscionable and oppressive.”).

153. Cal. Comm’n on Judiciary, *California Annotations to the Proposed Uniform Commercial Code*, reprinted in SENATE FACT FINDING COMM. ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE ON THE UNIFORM COMMERCIAL CODE 41–42 (1961); Donald Price, *Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 752 (1981) (“Statutory unconscionability represents no significant departure from the concept formerly available to a court confronted with oppressive conduct by a party to an agreement. Although the court

Supreme Court confirmed in *Perdue v. Crocker National Bank* that Civil Code § 1670.5 merely “codified the *established* doctrine” that already existed in the common law.¹⁵⁴ Courts are therefore free to declare a contract unconscionable under common law, even if a particular statutory provision incorporating unconscionability does not apply.

A. Unconscionability’s History under the Common Law, UCC, and Restatements Reveals That It May Be Asserted Offensively

It is not clear that the doctrine of unconscionability, as it exists in the common law and the Uniform Commercial Code, was ever intended to be used only defensively.¹⁵⁵ Nothing in the history of unconscionability jurisprudence precludes affirmative application of the doctrine. The Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts each provide for the defensive remedy of nonenforcement when a contract or term is found unconscionable.¹⁵⁶ However, as Professor Hazel Glenn Beh and other scholars have observed, the mere fact that the UCC and the Restatement do not expressly mention offensive remedies does not mean that such remedies are not available:

Notably, neither the Restatement nor the U.C.C. expressly limits unconscionability’s remedy to nonenforcement. Courts simplistically infer this limitation from the fact that the U.C.C. and the Restatement specifically allow judicial discretion to choose among nonenforcement remedies. The Restatement does not state that unconscionability is exclusively defensive. The Restatement commentary notes that a defensive remedial role for unconscionability is the “simplest application” and the “appropriate remedy . . . *ordinarily*.” This

possessed the necessary doctrinal tools for enforcement without the statute, section 2-302 provides explicit authority for the court to do directly what it previously did by indirection.”); Tracy Weston, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CALIF. L. REV. 123, 225 n.524 (1967) (noting that, although certain states impose no maximum statutory usury rate, “[c]ourts of equity still have the power to declare rates ‘unconscionable’ and reform the contract”).

154. *Perdue*, 38 Cal. 3d at 925 (emphasis added).

155. See WHITE & SUMMERS, *supra* note 6, at 239–40 (recognizing the possibility of restitutionary relief under a theory of unconscionability); Gerald T. McLaughlin, *Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles*, 14 LOY. L.A. INT’L & COMP. L.J. 439, 442–43 (1992) (“Courts that have construed [section 2–302] have ruled that the section does not permit an award of money damages upon a finding of unconscionability. A court’s inability to award money damages when a sale contract is held unconscionable leads to anomalous results . . . [that] may not have been the result intended by the U.C.C. drafters.”). Professor H.G. Prince wrote that courts have used “an unduly restrictive reading of Section 2-302” to wrongly deny affirmative unconscionability claims, but praised the handful of courts that “have recognized that the doctrine may be properly used as a basis for granting affirmative relief to a party either through restitution or by enforcing other provisions of the contract.” Prince, *supra* note 6, at 484–85 (1995); see also Beh, *supra* note 6, at 1025 (agreeing with Professor Prince that neither the UCC nor the Restatement prevents courts from applying unconscionability affirmatively).

156. Both the UCC and the Second Restatement state that courts may “refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.” U.C.C. § 2–302 (2002); see RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

language is not necessarily restrictive and instead might be viewed as expanding a judge's discretionary authority to include nonenforcement. The implication of the commentary is most certainly that nonenforcement may be the "simplest application" but leaves open the possibility of other remedies in appropriate circumstances.¹⁵⁷

At best, it is unclear whether these nonenforcement provisions were meant to expand or limit affirmative remedial action, yet most courts have simply assumed that no other remedy may be provided.¹⁵⁸ This has led some scholars to call this narrow reading of the UCC and the Second Restatement of Contracts a "fallacious" and "simplistic" view that produces "illogical" results.¹⁵⁹

James J. White and Robert S. Summers similarly stated in their treatise on the UCC that, although section 2-302 does not expressly provide remedies other than nonenforcement, this does not mean that additional remedies are unavailable.¹⁶⁰ White and Summers observe that, although some courts have held that section 2-302 provides no basis for an affirmative restitution claim, this conclusion finds no support in the text of the UCC.¹⁶¹ In fact, the authors explained that, "if money or property has been transferred to a party pursuant to a clause later held unconscionable, a restitutionary recovery would be precisely the appropriate remedy."¹⁶² Going even further, the authors wrote that unconscionability provides "as yet undeveloped possibilities for other remedies such as injunction[s] and punitive damages."¹⁶³

The notion that courts possess authority under the common law to provide affirmative relief against unconscionable contracts also finds express support in the *Third Restatement of Restitution and Unjust Enrichment*. Indeed, the Restatement states that "a party who has rendered a valuable performance under

157. Beh, *supra* note 6, at 1025 (emphasis added) (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt.g, *supra* note 156).

158. See, e.g., *Cowin Equip. Co., Inc. v. Gen. Motors Corp.*, 734 F.2d 1581, 1582 (11th Cir. 1984) (denying an affirmative unconscionability claim because "[t]he language of § 2-302 and the Official Comment which follows it make no mention of damages as an available remedy for an unconscionable contract"); *Whitman v. Connecticut Bank and Trust Co.*, 400 F. Supp. 1341, 1346 (D. Conn. 1975) ("[T]he 'unconscionability' provision of the Uniform Commercial Code . . . carries no provision for damages; the remedy it provides is express."); *Pearson v. Nat'l Budgeting Sys., Inc.*, 297 N.Y.S.2d 59, 31 A.D.2d 792 (N.Y. App. Div. 1969) ("Section 2-302 of the Uniform Commercial Code does not provide any damages to a party who enters into an unconscionable contract."); *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc.2d 1, 380 N.Y.S.2d 532, 541 (N.Y. Sup. Ct. 1976) ("U.C.C. § 2-302 . . . makes no provision for damages, and none may be recovered thereunder.").

159. See *Prince*, *supra* note 6, at 545, 548, 485.

160. See WHITE & SUMMERS, *supra* note 6, § 5-8, at 236-40.

161. *Id.* at 239 ("Occasionally a court has remarked that a finding of unconscionability affords no basis for a recovery on a restitutionary theory. But 2-302 does not so provide.").

162. *Id.* at 239-40; see also *supra* note 39 and accompanying text (noting the relationship between unconscionability, unjust enrichment, and restitution).

163. WHITE & SUMMERS, *supra* note 6, § 5-3, at 221; see also *id.* § 5-8, at 238-39 (suggesting that "it might be desirable to impose punitive damages in certain unconscionability cases," but observing that such a policy would likely face several barriers). But see *infra* notes 213-222 and accompanying text (discussing the likely infeasibility of punitive damages under an unconscionability theory).

a contract that is held to be unconscionable might nevertheless be entitled to recover the amount of a net benefit conferred on the recipient”¹⁶⁴ For example, if a court finds that a debtor has paid funds under an unconscionably high interest rate, the court may reduce the interest rate and permit recovery of excess interest.¹⁶⁵ This resembles how debtors may assert “a claim in common-law restitution” to “recover[] usurious payments.”¹⁶⁶ To explain this principle, the Restatement even uses consumer loans as an example:

A borrows money from B at a market rate of interest that the laws of the jurisdiction condemn as usurious, then repays the loan in accordance with its terms. The statute regulating the parties’ transaction affords defensive relief only: it provides that the borrower may not be compelled to pay interest exceeding the stated maximum, but it is silent on the borrower’s right to restitution of excess interest paid. A has a claim against B under the rule of § 32(1) *to recover interest paid in excess of the amount to which the debt could have been legally enforced.*¹⁶⁷

Although usury and unconscionability are distinct claims, the same principles of equity that demand the recovery of usurious payments equally demand the recovery of unconscionable payments.¹⁶⁸

The *Restatement (Third) of Restitution and Unjust Enrichment* similarly describes how parties subject to an illegal contract may obtain affirmative equitable relief under common law.¹⁶⁹ Section 32 of the Restatement explains

164. 1 RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT, at 482 (2010).

165. *See id.* at 520.

166. *Id.*

167. 1 RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 164, § 32. illus.1, at 509 (emphasis added).

168. *See id.* at 494 (“Because the policy behind a rule of unenforceability is ordinarily intended as a shield and not a sword, the denial of restitution in such circumstances works the kind of forfeiture that equity is said to abhor.”); HUGH BELLOT & R. JAMES WILLIS, *THE LAW RELATING TO UNCONSCIONABLE BARGAINS WITH MONEY LENDERS* 35–36 (1897) (explaining how courts of equity invoked the equitable doctrine of unconscionability to defeat oppressive bargains that evaded usury laws); ROBERT BUCKLEY COMYN, *TREATISE ON THE LAW OF USURY* 215 (1817) (“As in cases of usury, so in transactions, which though not actually amounting to usury, are yet hard and unconscionable in their terms, a court of equity will interfere.”); *id.* at 218 (“[I]f judgment cannot be given on the statute, it shall be given at common law; as where there is a taking of usurious interest”); *id.* at 217 (describing a case in which the court “ordered the defendant to refund to the plaintiff all the money he had received of him, except the [amount] originally lent, and the interest for the same”); Garrard Glenn, *Oppressive Bargains: Equity and the Credit Market*, 19 VA. L. REV. 594–609, 605 (1933) (“If the price [of credit] is oppressive, the borrower, although not able to plead the usury laws, will be relieved against it today as he was in older times.”).

169. For more on using a contract’s illegality to recover restitution, see generally Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); Kuklin, *supra* note 62; John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution*, 25 TEX. L. REV. 31 (1946); John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947). *See also* Daniel Friedmann, *Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980).

that a party may affirmatively seek restitution under a contract that is “illegal or otherwise unenforceable for reasons of public policy.”¹⁷⁰ Moreover, section 32(f), titled “*Illegality as a Sword*,” explains that plaintiffs can use “an illegal transaction” as an affirmative sword to obtain restitution.¹⁷¹ The Restatement explains that “the illegality may be asserted defensively, by the recipient of performance, who seeks to avoid liability on the contract; or offensively, by the performing party, who repudiates the transaction and seeks to recover the performance or its value.”¹⁷² In other words, a party who has already paid under an illegal contract may assert that contract’s illegality to affirmatively recover restitution. According to the Restatement, courts should allow restitution against such illegal contracts to “simultaneously . . . frustrate a prohibited transaction and to prevent an unjust enrichment.”¹⁷³ Because an unconscionable contract is itself an illegal contract,¹⁷⁴ plaintiffs may wield an unconscionable contract as a sword, just as they could any other illegal contract.¹⁷⁵ These passages from the *Restatement* evince the understanding that affirmative common law claims may lie against inequitable contracts.

170. 1 RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 164, § 32. illus.1, *Illegality*, at 505.

171. *Id.* § 32(f) *Illegality as a Sword*, at 519.

172. *Id.*

173. *Id.*; *see also id.* at 506 (“If the prohibited transaction has nevertheless been partially performed, it is likely to result in the unjust enrichment of one party at the expense of the other”); *supra* note 39 and accompanying text (noting the relationship between unconscionability, restitution, and unjust enrichment).

174. *See* CAL. CIV. CODE § 1670.5 (2019) (declaring unconscionable contracts to be unlawful).

175. The common count of “money had and received” has long allowed for recovery of money paid under a contract void for illegality or undue oppression. *See, e.g.,* *Minor v. Baldrige*, 123 Cal. 187, 191 (Cal. 1898) (“This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff’s situation contrary to the laws made for the protection of persons under those circumstances.”) (citation omitted and emphasis added); *Utility Audit Co., Inc. v. Los Angeles*, 112 Cal. App. 4th 950, 958 (Cal. Ct. App. 2003) (“A claim for money had and received can be based upon money paid by mistake, *money paid pursuant to a void contract*, or a performance by one party of an express contract.”) (citations omitted and emphasis added); *Schultz v. Harney*, 27 Cal. App. 4th 1611, 1623 (Cal. Ct. App. 1994) (“The cause of action [for money had and received] is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is *void for illegality*.”) (citations omitted and emphasis added); *J.C. Peacock, Inc. v. Hasko*, 196 Cal. App. 2d 353, 361 (Cal. Ct. App. 1961) (“It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, *under duress, oppression, or where an undue advantage was taken of plaintiffs’ situation* whereby money was exacted to which the defendant had no legal right.”) (citations omitted and emphasis added); *see also* WARREN SWAIN, *THE LAW OF CONTRACT 1670–1870*, at 118 (2015) (describing how the historical action of “[m]oney had and received,” which was “sometimes likened to a bill in Equity, . . . had the potential to grow into a broad remedy *protecting against the unconscionable receipt* of another person’s money”) (emphasis added); *VIRGO*, *supra* note 39 and accompanying text.

B. Allowing Affirmative Relief from Unconscionable Contracts Is Consistent with the Doctrine's Historical Roots in Courts of Equity

It is curious that courts have so uniformly denied affirmative relief against unconscionable contracts given the support for the idea found in the Restatements and in the scholarly literature.¹⁷⁶ One likely culprit behind courts' reluctance to embrace an affirmative unconscionability doctrine is the continued influence of legal formalism and the law-and-economics movement's attacks on judicial intervention into markets and purported contractual freedom.¹⁷⁷ As equity began to wane in the nineteenth century, a new era of legal formalism began to metastasize, leaving many courts apprehensive about exercising a flexible, discretionary jurisprudence.¹⁷⁸ The rise of the *caveat emptor* doctrine¹⁷⁹ and "classical laissez-faire contract theory during the nineteenth century displaced judicial willingness to sit in judgment of the substantive fairness of contractual bargains . . . and reduced the contours of unconscionability to a refusal to enforce contracts."¹⁸⁰ Although legal formalism faced a brief setback in the early 20th century at the hands of legal realists such as Roscoe Pound,¹⁸¹

176. See, e.g., *supra* notes 6, 39 and accompanying text.

177. See generally Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647 (2009) (describing the controversy of incorporating community norms of fairness into the contract relationship); Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145, 145 (1992) ("Perhaps no two doctrines developed during the 19th century and the first half of the 20th century were seen as so inimical to the establishment of a basic fairness and equity in the marketplace as were the doctrines of *caveat emptor* and an absolute 'freedom of contract.'").

178. ATIYAH, *supra* note 41, 388–98 (1985) (discussing "the rise of formalism and the decline of equity" that took place during the nineteenth century); Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 L. & CONTEMP. PROBS. 263, 282 (1996) ("Partly due to the influence of nineteenth century analytical jurisprudence, which considered the application of legal precepts akin to the mechanical application of a mathematical formula, equitable discretion was commonly viewed as contrary to the rule of law. Moreover, the increasing demands for uniformity and predictability in commercial transactions and other areas of economic life tended to restrict the individualized decisionmaking that characterized equitable adjudication.").

179. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 180 (2009) ("The nineteenth century departure from the equitable conception of contract is particularly obvious in the rapid adoption of the doctrine of *caveat emptor*. . . . The sudden and complete substitution of *caveat emptor* in place of the sound price doctrine must therefore be understood as a dramatic overthrow of an important element of the eighteenth century's equitable conception of contract."); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1163–69, 1180–81, 1186 (1931) (tracing the historical development of the mantra *caveat emptor*, or "buyer beware," in the common law and courts of equity).

180. Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. REV. 183, 197 (2015); see also John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 271 (1947) ("The triumphant progress of laissez-faire was leaving its mark on nineteenth century equity, which increasingly relaxed its tests of adequacy of consideration in the interests of 'freedom of contract.'").

181. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905) (arguing that equity must temper the formalism of law); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) [hereinafter Pound, *Mechanical Jurisprudence*].

the philosophy would later find renewed strength in the industry-backed law-and-economics movement of the 1980s, which continues to deride distributional and normative-based market intervention to this day.¹⁸²

Moreover, industry critics and law-and-economics scholars frequently malign the *ex post* application of flexible, case-by-case standards such as unconscionability as too uncertain or unpredictable.¹⁸³ Some maintain that equipping courts with wide discretion to strike down certain contract terms would upend freedom of contract and undermine the predictability created by uniform enforcement of agreements.¹⁸⁴ These demands for predefined, predictable rules have created a judicial aversion to the flexible standards that have historically pervaded courts of equity.¹⁸⁵

But these demands ignore the historical distinction between law and equity. Unlike courts of law, whose rigid, universal rules leave little room to consider the equities involved in the facts surrounding each case, courts sitting in equity have long favored equipping judges with discretionary standards to render justice based on the facts of each case.¹⁸⁶ Although law is the dominant adjudicatory

182. See Singer, *supra* note 53, at 522–28 (discussing how the efficiency arguments advanced by law-and-economics scholars exhibit a “highly formalistic” view of contract law and are “constantly turning *normative* questions into *descriptive* questions”) (emphasis added); Michael I. Swygert & Katherine E. Yates, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 255–56 (1998) (“[L]aw and economics proponents argue that legal rules should be applied to produce the most efficient, wealth-maximizing consequences, wholly apart from empathic considerations about the parties and their relative situations.”).

183. See Schmitz, *supra* note 2, at 75 (“A growing number of scholars promote formalism to the detriment of unconscionability by criticizing the doctrine for its vagueness and uncertainty. . . . Law and economics supporters add to this criticism by claiming that unconscionability’s lack of clear definition and predictable application hinder economic efficiency.”).

184. See generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (describing how “traditional contract law” favors stability while “relational” contract theory favors flexibility).

185. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637–38 (1943) (“[C]ourts . . . prefer to convince themselves that ‘sound principles’ of contract law should not be sacrificed to dictates of justice or social desirability. . . . But it is equally true that the rules of the common law are flexible enough to enable courts to listen to their sense of justice and to the sense of justice of the community. Just as freedom of contract gives individual contracting parties all the needed leeway for shaping the law of contract according to their needs, the elasticity of the common law, with rule and counter-rule constantly competing, makes it possible for courts to follow the dictates of ‘social desirability.’ . . . [T]he ideal of certainty has constantly to be weighed against the social desirability of change, and very often legal certainty has to be sacrificed to progress.”); Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119, 1163 (1994) (“Ensuring maximally ‘just’ legal outcomes inevitably requires granting discretion to the legal decisionmaker to fashion the precise rule *ex post*.”).

186. See A. W. B. SIMPSON, *A HISTORY OF THE COMMON LAW OF THE CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 400* (1987) (“[T]he conception of Equity . . . modifies the rigour of the rules of positive law by providing exceptions in particular cases in accordance with the spirit, but not the letter of the law. . . .”); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 276 (1991) (describing the equitable model of enforcement, “which grants relief from contract obligations on the basis of unfairness in the process and substantive content of a bargain, [and] . . . it operates by means of standards rather than rules”); Roger A. Shiner, *Aristotle’s Theory of Equity*, 27

paradigm, the tradition of equity has deep roots in Western jurisprudence. Indeed, since the time of Aristotle's *Nicomachean Ethics*, philosophers and legal scholars have noted the critical discretionary role that equity plays in the pursuit of justice.¹⁸⁷ The Aristotelian notion of discretionary equity informed the early development of western philosophy and legal history and ultimately was adopted by the English Courts of Chancery, which acted "only when justice cried out for a solution that was not available within the procedural strictures of law."¹⁸⁸ Chancellors presiding over courts of equity historically provided flexible remedies to build "a protective jurisdiction of conscience as a refuge for those unfitted to a world of hard bargaining."¹⁸⁹ Equity has therefore been said to "operate on a higher moral plane than law," precisely because of its flexibility.¹⁹⁰

The doctrine of unconscionability represents the modern survival of these ancient principles of equity. Before its incorporation into law through the adoption of the UCC, the doctrine of unconscionability historically resided in the realm of equity¹⁹¹ and thus enjoyed the flexibility to which equitable remedies

LOY. L.A. L. REV. 1245, 1252 (1994) ("Equity is the Aristotelian virtue that represents the exercise of making . . . tailor made, particularized judgments."); Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 L. & CONTEMP. PROBS. 263, 264 (1996) ("Aristotle's . . . writings demonstrate[] that a judge's use of equity is a necessary and stabilizing feature of the application of universal laws to particular cases.").

187. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS*, BK.5 CH.10 (c. 350 B.C.E.) (describing the flexible nature of equity as "a correction of law where it is defective owing to its universality"); THOMAS AQUINAS, *Of "Epikieia" or Equity*, in *SUMMA THEOLOGICA*, PART II. Q.120 (c. 1265–74) (Benziger Bros. ed. 1917), https://en.wikisource.org/wiki/Summa_Theologiae/Second_Part_of_the_Second_Part/Question_120 [<https://perma.cc/NWJ7-5RRD>] ("[I]f the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good. . . . In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of 'epikeia' which we call equity."); see also *infra* notes 189–190 and accompanying text.

188. Sherwin, *supra* note 186, at 264–65.

189. Amy Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 81 (2006) (emphasis removed); see also WIM DECOCK, *THEOLOGICALS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE (CA. 1500–1650)*, at 509 (2012) ("The moral foundations of scholastic contract law largely rest on the Aristotelian-Thomistic virtue of commutative justice. . . . Until the age of the codifications, justice in exchange forms the common institutional translation of a genuine concern with contractual equilibrium now often associated with social responsibility, consumer protection or unconscionability. It stipulates that contracts should not suffer from gross disparity or one sidedness. Contracts should not enrich one party while harming another."); *id.* at 619 ("If parties who had enriched themselves at the expense of another failed to make restitution, they jeopardized [sic] the salvation of their souls, according to the absolutely fundamental statement of Augustine that remission of sins is impossible as long as restitution of 'stolen' goods has not been made.").

190. Sherwin, *supra* note 186, at 254; see also *Missouri v. Jenkins*, 495 U.S. 33, 78 (1990) ("[E]quity has been characterized by a practical flexibility in shaping its remedies."); *Bravo v. Buelow*, 168 Cal. App. 3d 208, 214 (Cal. Ct. App. 1985) ("Equity is not bound by rigid precedent, but has the flexibility to adjust the remedy in order to do right and justice.").

191. See CORBIN, *supra* note 152, § 5.15 ("In the last part of the 20th century the doctrine of unconscionability has been borrowed from equity by law."); Dando Cellini & Barry Wertz,

are entitled.¹⁹² Indeed, Justice Harlan Fiske Stone once noted that the concept of unconscionability forms the foundation for “practically the whole content of the law of equity.”¹⁹³ Ultimately, the inherent flexibility of unconscionability was reaffirmed when it was incorporated in Section 2–302 of the UCC.¹⁹⁴ In fact, “unconscionability’s incorporation of flexible fairness norms is what led Professor [Karl] Llewellyn, the Chief Reporter and architect of Article 2, to describe this section as ‘perhaps the most valuable section in the entire Code.’”¹⁹⁵

Today’s overly rigid and formalistic interpretation of unconscionability as a defensive-only doctrine runs afoul of the doctrine’s equitable roots as a flexible “vehicle for protecting fairness and justice.”¹⁹⁶ As Professor Amy Schmitz has explained, “the problem with this increasing rigidity is that it ignores the history and philosophy” of the unconscionability doctrine, which derives its value “from its appropriately contextual concern for societal fairness norms.”¹⁹⁷

Following the merger of law and equity, it was inevitable that demands for individualized, discretionary justice would eventually conflict with demands for rigid predictability.¹⁹⁸ Although businesses understandably seek certainty and predictability, society need not tailor its conscience to commercial demands. Justice demands that legal rules be not only predictable, but also humane. As equity scholar Ralph Newman wrote in *The Place and Function of Pure Equity in the Structure of Law*, “[t]he gradual humanization of law has brought about a change in its structure from rigid rules to broader and more flexible principles.”¹⁹⁹ By denying affirmative unconscionability claims, the majority

Unconscionable Contract Provisions: A History of Unenforceability From Roman Law To The UCC, 42 TUL. L. REV. 193 (1967) (detailing the historical roots of the doctrine of unconscionability).

192. See M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 814–15 (1969) (recognizing that, while the unconscionability doctrine is admittedly vague, “we cannot do without such regrettable vague standards”); Schmitz, *supra* note 189, at 79–84.

193. CORBIN, *supra* note 152, § 5.15 n1 (quoting Harlan Fiske Stone, Book Review, 12 COLUM. L. REV. 756, 756 (1912)).

194. See McLaughlin, *supra* note 155, at 444 n.26 (noting that the drafters of UCC § 2–302 intentionally avoided a precise definition for unconscionability, choosing instead to leave the term indeterminate and flexible).

195. Schmitz, *supra* note 189, at 85 (quoting *Memorandum by K.N. Llewellyn replying to the Report and Memorandum of Task Group 1 of the Special Comm. of the Commerce and Indus. Ass’n of N.Y., Inc., on the Uniform Commercial Code* (Aug. 16, 1954), in 1 STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION 1954 AND RECORD OF HEARING ON THE UNIFORM COMMERCIAL CODE 106, 121 (1954)).

196. Schmitz, *supra* note 189, at 74.

197. *Id.* at 75.

198. See Ralph Newman, *The Place and Function of Pure Equity in the Structure of Law*, 16 HASTINGS L.J. 401, 408 (1965) (“In most parts of the world, equity and law ultimately merged into unitary legal systems in which the principles of equity were integrated into the main body of the law; but always the clashing objectives of certainty and ideal justice have prevented a complete integration.”).

199. *Id.* at 419–20; see also Roscoe Pound, *Justice According to Law I*, 13 COLUM. L. REV. 696, 699 (1913) (“Legal history shows a constant movement back and forth between wide judicial discretion on the one hand, and strict confinement of the magistrate by detailed rules upon the other hand. From time to time more or less reversion to [discretionary equity] becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.”).

view ignores the fact that it was these “flexible fairness norms” that “planted the seed for the unconscionability defense” in the first place.²⁰⁰

*C. Courts May Invoke Equitable Remedies to Affirmatively Remedy
Unconscionable Contracts*

Courts should exercise their inherent power to fashion affirmative remedies against unconscionable contracts when it is equitable to do so.²⁰¹ This is far from a radical or novel view. Indeed, this is precisely the approach adopted by both the Uniform Consumer Credit Code²⁰² and the Uniform Consumer Sales Practices Act of 1970,²⁰³ which expressly provide an affirmative cause of action against unconscionable trade practices. For example, the Uniform Consumer Sales Practices Act “forbid[s] unconscionable advertising techniques, unconscionable contract terms, and unconscionable debt collection practices.”²⁰⁴ After clarifying that “an unconscionable act or practice” violates the law “whether it occurs before, during, or after the transaction,”²⁰⁵ the Act goes on to provide extensive legal remedies, including declaratory and injunctive relief, reasonable attorney’s fees, and “actual damages or [\$100], whichever is greater.”²⁰⁶ These model statutes demonstrate that an affirmative unconscionability doctrine is both a moderate and feasible approach to enhance consumers’ remedies against contractual overreach.

Some scholars have even suggested the creation of a new “tort of unconscionability” to better deter contractual overreach and to counter courts’ unwarranted aversion to affirmative application of the doctrine.²⁰⁷ Some even

200. Schmitz, *supra* note 189, at 82.

201. See Beh, *supra* note 6, at 1015 (“[To] make unconscionability more vital and robust, more courts [should] follow those few courts that entertain unconscionability as an affirmative claim that can be brought by a victim.”).

202. See *supra* note 92 and accompanying text.

203. See UNIF. CONSUMER SALES PRACTICES ACT (UNIF. L. COMM’N 1970). Three states have enacted the Uniform Consumer Sales Practices Act: Kansas, Ohio, and Utah. For additional analysis of the unconscionability provisions in the Uniform Consumer Sales Practices Act, see Friedman, *supra* note 61, at 348–55.

204. UNIF. CONSUMER SALES PRACTICES ACT, § 4 cmt.

205. *Id.* § 4(a).

206. *Id.* § 11.

207. See, e.g., Craig Horowitz, *Reviving The Law of Substantive Unconscionability: Applying The Implied Covenant of Good Faith And Fair Dealing To Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 963 (1986) (proposing “a tort-based framework for evaluating substantively unconscionable consumer credit contracts”); Donald B. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U. L.J. 97, 125 (1979) (“The new tort of unconscionability may be a significant tool for achieving consumer justice.”); Marrow, *supra* note 62, at 16 (“Unconscionable conduct in the negotiation process should be deterred. . . . The tort that this article proposes, Consequential Procedural Unconscionability, provides an instrument for deterrence. Without this tort, the tortfeasor has no reason to refrain from exploiting the benefits available through the use of procedurally unconscionable strategies and tactics.”); Philip Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 NYU L. REV. 115, 149, 145 (1969) (describing how the author invented “the tort of persistent unconscionability” by “accusing [the defendant] of engaging in a pattern and practice of purchasing unconscionable contracts, which on their face were exorbitant, and alleging

contend that the equitable remedies of rescission, reformation, and restitution provide insufficient deterrence against unconscionable contracts,²⁰⁸ suggesting that courts should award punitive damages instead.²⁰⁹

While awarding punitive damages under a theory of unconscionability would indeed have a deterring effect on exploitative contractual overreaching, this proposal is unlikely to succeed and should thus be set aside to instead provide affirmative equitable remedies such as restitution, reformation, and rescission.²¹⁰ As the relatively amoral branch of private law,²¹¹ the law of contracts is said to be inhospitable to the value-laden ends sought by punitive damages awards.²¹² For better or worse, the historical consensus among scholars and courts holds that punitive damages are not available in an action for breach of contract unless a separate *tort* claim independently establishes liability in tort.²¹³ While a handful of scholars and attorneys have proposed

that such conduct subjected them to liability for punitive damages”); *id.* at 157 (“I . . . argu[ed] that a pattern or practice of financing contracts that were on their face unconscionable was tortious. I made plain in my brief that I was relying for the relief demanded upon tort theory, not upon the Uniform Commercial Code.”); Gaddy Wells, *The Doctrine of Unconscionability: A Sword As Well As a Shield*, 29 BAYLOR L. REV. 309, 313 (1977) (proposing a new tort of unconscionability). *See generally* Friedman, *supra* note 61, at 355–59 (reviewing various unconscionability-based tort theories but ultimately concluding that “contractual unconscionability and tort law d[o] not make a good match”).

208. *See, e.g.*, Korobkin, *Bounded Rationality*, *supra* note 9, at 1286–87 (“The primary problem with the reformation remedy is that it provides no incentive for sellers to resist the market pressure to provide low-quality non-salient form terms even when low-quality terms are inefficient . . . [A] remedy of reformation would ensure that inefficient terms would be commonplace in form contracts.”).

209. *See, e.g.*, WHITE & SUMMERS, *supra* note 6, § 5-2, at 238–39 (“It would be a natural extension of these principles to grant punitive damages where one party engages in behavior that is a first cousin to fraud and knowingly enters into a contract which unconscionably benefits him or her.”); Marrow, *supra* note 62 at 15 (2004) (“Unconscionable conduct in the negotiation process should be deterred. Current statutory attempts to curb unconscionable activity fall short of providing the deterrence that is needed. Remedies at law, not equity, accomplish deterrence.”).

210. For a comparison of remedies available at law and equity, see generally John P. Dawson, *Restitution or Damages?*, 20 OH. ST. L.J. 175 (1959); Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609 (1997). For an early discussion comparing legal and equitable causes of action, see generally Silas A. Harris, *What Is A Cause of Action?*, 16 CALIF. L. REV. 459, 470 (1928).

211. *See* Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 111 (1981) (noting how contract law “excludes considerations of morality” to instead “advance the objective of economic efficiency”).

212. *See* RESTATEMENT (SECOND) OF CONTRACTS *supra* note 156, § 355, *Punitive Damages* (“Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”); *id.* at cmt.(a), *Compensation not punishment*. (“The purposes of awarding contract damages is to compensate the injured party. For this reason, courts in contract cases do not award damages to punish the party in breach or to serve as an example to others *unless the conduct constituting the breach is also a tort* for which punitive damages are recoverable.”) (citations omitted and emphasis added). *But see* WHITE & SUMMERS, *supra* note 6 and accompanying text (“The rule is well established that punitive damages are appropriate in cases involving malicious, wanton, or reckless fraud. . . . It would be a natural extension of these principles to grant punitive damages where one party engages in behavior that is a first cousin to fraud and knowingly enters into a contract which unconscionably benefits him or her.”).

213. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (“[P]unitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.”); *Erlich v.*

unconscionability-based tort theories over the years,²¹⁴ these claims have not yet found success in courts.²¹⁵ Plaintiffs should continue proposing such novel tort theories, but the infrequency with which courts recognize new torts means that a much broader course of action is needed if we are to adequately remedy today's scourge of unconscionable contracts.²¹⁶

Menezes, 981 P.2d 978, 21 Cal. 4th 543, 551–52 (Cal. 1999) (“[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.”); *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 960 (Cal. Ct. App. 1993) (“An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was willful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.”) (citations omitted). See generally Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 93–102 (2003) (discussing the availability of punitive damages in contract law). But see William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999) (taking the minority position that punitive damages should be available in contracts cases to deter willful, opportunistic breaches).

214. See, e.g., RADIN, *Reconceptualizing (Some) Boilerplate under Tort Law*, in *BOILERPLATE*, *supra* note 7, at 197–216 (arguing that firms should be liable in tort if they insert unconscionable terms into consumer contracts); *supra* note 207 and accompanying text. For an online symposium featuring a variety of perspectives on Professor Margaret Radin’s novel tort theories, see *Boilerplate Symposium*, CONTRACTS PROF BLOG (May 27, 2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-week-3.html [<https://perma.cc/5YPJ-6PY6>].

For critical reviews of Professor Radin’s tort theories, see Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (reviewing Professor Radin’s book and arguing that boilerplate contract language limiting consumers’ rights benefits consumers by producing reduced prices); Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373 (2014); Steven W. Feldman, *Expanded Merchant Tort Liability, Democratic Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Part II)*, 63 CLEV. ST. L. REV. 163 (2014).

For a reply to and critique of Professor Ben-Shahar’s book review, see Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)*, L. & ECON. WORKING PAPERS, Paper 98, at 9 (2014) (explaining how Chicago-School thinkers’ assumption that businesses should be free to condemn consumers’ legal rights without “actual, real consent” is in effect converting property rules into liability rules and thereby collapsing “the distinction between the private realm and the public realm”), http://repository.law.umich.edu/law_econ_current/98 [<https://perma.cc/76UM-A2JS>]; see also MEL A. EISENBERG, *FOUNDATIONAL PRINCIPLES OF CONTRACT LAW* 526–29 (2018) (arguing that there is no reason to believe that deleting consumers’ rights will translate into any meaningful price reductions, and suggesting that serious moral concerns would remain even if we were to assume such price reductions). See generally *supra* note 207 and accompanying text (reviewing literature suggesting tort theories against unconscionable contracts).

215. See, e.g., Schrag, *supra* note 207 and accompanying text (describing how a court rejected the author’s novel tort theory based on unconscionability).

216. For a scholarly analysis of how new tort theories develop, see generally Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (describing the judicial reluctance against recognizing new torts); Robert F. Blomquist, *New Torts: A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23 (1990) (extensively surveying the historical development of new tort theories throughout the course of the 20th century).

Despite contract law's general aversion to punitive damages, the unconscionability doctrine may yet provide a means to punitive damages in certain cases. As contracts scholars James J. White and Robert S. Summers have observed, "[u]nconscionability is not a breach, but rather conduct analogous to fraud that renders the agreement void and unenforceable."²¹⁷ Thus, where a contract is tainted with clear evidence of "malicious, wanton, or reckless fraud," a court may find that punitive damages are permissible.²¹⁸

Consumers should fully pursue punitive damages in appropriate cases, but such claims will likely face resistance from courts, considering the ambiguity surrounding the unconscionability doctrine. As a general rule, courts typically reserve punitive damages awards only for cases of *intentional* misconduct demonstrating a "willful and conscious disregard of the rights or safety of others."²¹⁹ Given the inherent vagueness of the unconscionability standard, it is not always clear in advance whether a particular contract is unconscionable. Thus, courts are unlikely to find the requisite level of deliberate, wanton wrongdoing that would justify punitive damages except in the most egregious cases involving manifestly unconscionable conduct.

The feasibility of awarding punitive damages is further complicated by the conflicting principles of law and equity that underlie punitive damages and unconscionability, respectively. Professor Stephen Friedman has noted that "the nonequitable nature of punitive damages is inconsistent with unconscionability's [equitable] heritage and . . . an award of punitive damages by a judge would raise various constitutional objections regarding the right to jury trial."²²⁰ This is because unconscionability is determined at the bench,²²¹ while punitive damages

217. WHITE & SUMMERS, *supra* note 6, § 5-8, at 238.

218. *Id.* at 238–39 ("The rule is well established that punitive damages are appropriate in cases involving malicious, wanton, or reckless fraud. . . . It would be a natural extension of these principles to grant punitive damages where one party engages in behavior that is a first cousin to fraud and knowingly enters into a contract which unconscionably benefits him or her.")

219. CAL. CIV. CODE § 3294(c)(1) (2019); *see also* David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 328–30 (1969) (discussing the availability of punitive damages where the defendant acts with intentional malice).

220. Friedman, *supra* note 61, at 367 (arguing that awarding attorney's fees in response to contractual unconscionability is a better remedy than awarding punitive damages).

221. Friedman, *supra* note 61, at 367; Hunter, *supra* note 177, at 151 ("[T]he text of the UCC makes it clear that the substantive issue of unconscionability is one to be decided by the court as a matter of law. While challenged on the ground that such a provision denies a litigant an opportunity of a trial by jury, this section has been upheld on the basis that the issue of unconscionability is, at its core, an equitable issue for which no constitutional right to a trial by jury exists."); Michael Lobban, *Consumer Credit and Debt*, in THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME XII, *supra* note 41, at 834–78, 867 ("It was left to the judge, rather than a jury, to determine whether the bargain was unconscionable, a policy which reflected . . . the fear that juries would always find for the borrower . . ."). *But see* Donald Price, *Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 761 (1981) (critiquing the majority view and positing that unconscionability should be determined by juries instead of judges).

has “historically been a jury question.”²²² Efforts to reform the unconscionability doctrine’s remedies should therefore focus on equitable remedies such as rescission, restitution, and reformation²²³ to avoid the constitutional challenges that would follow punitive damages awards.

At the end of the day, whatever remedies plaintiffs request, and however they label the cause of action, courts have “a duty to examine the factual allegations of the complaint to determine whether they state a cause of action on any available legal theory.”²²⁴ The underlying *facts* of a claim give rise to a cause

222. Friedman, *supra* note 61, at 358. *But see* James L. Surface, *Exemplary Damages in Equity*, 21 WASH. & LEE L. REV. 306 (1964) (praising the minority of cases in which a court sitting in equity rejected the majority view and instead awarded punitive damages without a jury trial); W. Kip Viscusi, *Do Judges Do Better?*, in PUNITIVE DAMAGES: HOW JURIES DECIDE 186–210, 187 (Cass R. Sunstein et al. eds., 2008) (arguing that judges are “better able to put risk decisions in perspective” when assessing potential punitive damages awards). *See generally* Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Lisa M. Sharkey, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089 (1996).

223. For a discussion of the various theories of reformation that courts may employ after finding a contract unconscionable, see generally Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869 (2011) [hereinafter Ben-Shahar, *Fixing Unfair Contracts*] (arguing that courts should reform unconscionable contract terms to the “minimally tolerable” level).

224. Douglas L. Johnson & Neville L. Johnson, *What Happened to Unjust Enrichment in California? The Deterioration of Equity in the California Courts*, 44 LOY. L.A. L. REV. 277, 294–95 (2010); *see id.* at 289 (“Courts have been too easily transfixed on the label of the claim rather than the gravamen of the claim.”); *id.* at 292–93 (“California courts have not been entirely consistent with the terminology, but it does not matter whether the claim is styled as unjust enrichment, restitution, quasi-contract, or quantum meruit; California law respects form less than substance.”). Recognizing this duty, scholars have offered a variety of alternative theories to find merchants liable for unconscionable conduct. *See, e.g.*, Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1 (1975) (observing the unconscionability doctrine’s limitations and proposing “improvident credit extension” as a separate theory of liability); Terri Rebecca Daniel, *Improvident Extension of Credit as an Extension of Unconscionability: Discover Bank v. Owens and a Debtor’s Rights against Credit Card Companies*, 54 CLEV. ST. L. REV. 435, 457 (2006) (“To become an adequate solution, courts must extend unconscionability a step further to improvident extension of credit.”); Horowitz, *supra* note 207, at 963 (proposing “a tort-based framework for evaluating substantively unconscionable consumer credit contracts”); John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 1 U. ILL. L. REV. 405 (2007) (proposing that debtors be given a new cause of action against lenders who irresponsibly provide credit to those with no ability to repay); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472–73 (2008) (noting the limitations of traditional unconscionability analysis and urging courts to instead adopt the concept of “knowing assent” to determine the enforceability of unfavorable terms); *see also supra* note 175 and accompanying text (discussing how the common count of “money had and received” has historically allowed affirmative recovery of money paid under a contract that is void for illegality or undue oppression).

If a party fails to assert a cognizable claim, courts should nonetheless apply the doctrine of unconscionability *sua sponte*. *See* Langemeier v. Nat’l Oats Co., 775 F.2d 975, 977 (8th Cir. 1985) (“Moreover, we are of the opinion that the language of U.C.C. § 2–302 permits a court to raise this issue *sua sponte*. . . . The plain language of [UCC § 2–302] subsection (1) permits the court to raise this issue *sua sponte*. Moreover, subsection (2) is written in the disjunctive: ‘[w]hen it is claimed or *appears to the court*.’ Thus, the court may raise this issue *sua sponte*. . . .”) (emphasis in original); *see also* Barco Auto Leasing Corp. v. PSI Cosmetics, Inc., 125 Misc.2d 68, 478 N.Y.S.2d 505, 39 UCC 840 (1984) (deeming the contract’s conscionability at issue despite party not pleading the doctrine); BELLOT, *supra* note 168, at xi (“[T]he equitable doctrine relating to unconscionable bargains . . . should be embodied

of action, not its form.²²⁵ Yet, as legal historian Frederick W. Maitland wrote in 1909, “The forms of action we have buried . . . still rule us from their graves.”²²⁶ To mechanically deny relief against a demonstrably unconscionable contract simply because an ostensibly novel claim does not neatly fit a pre-existing cause of action is to deny the very nature of equity itself.²²⁷ Indeed, it was such “highly formal” procedural requirements in courts of law that led to the creation of courts of equity in the first place.²²⁸ As the court in *Cassinovs v. Union Oil Co.* put it, “[e]quity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would

in a statute allowing such doctrine to be pleaded by way of defense in any Court in all cases of loan transactions, and that *in the event of any defendant omitting to plead the statute, the Judge or Court should be empowered to give effect to the statute as if it had been specially pleaded as a defense*, thus giving the Judge in all cases a wide discretion in considering all the circumstances of the case, so as to enable him to decide whether or not the contract was fair and reasonable.” (emphasis added); WHITE & SUMMERS, *supra* note 6, § 5-3, at 220 (“Although it would be useful for the defendant to plead unconscionability as an affirmative defense, the words of 2–302(1) also seem to permit a court to raise the issue *sua sponte*.”) (citing *Kohlenberger, Inc. v. Tyson’s Foods, Inc.*, 510 S.W.2d 555 (Ark. 1974)); Beh, *supra* note 6, at 1029–30 (arguing that courts should strike unconscionable contract terms *sua sponte*).

225. See Harris, *supra* note 210, at 470 (“The same cause of action—group of constitutive or operative facts, if you please—can be used by a plaintiff to obtain equitable relief or legal relief.”); Oliver L. McCaskill, *The Elusive Cause of Action*, 4 U. CHIC. L. REV. 281, 286 (1937) (“We usually think of the statement of a claim as an attempt to portray the plaintiff’s present right to invoke judicial assistance, by the setting out of facts which have transpired. . . . The factual situation in the picture, whether it exists in truth or not, is placed under examination. The application of legal principles to it alone determines the right to a recovery.”).

226. FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 2 (A.H. Chaytor & W.J. Whittaker eds., 1936).

227. See Johnson & Johnson, *supra* note 224, at 294 (“Regardless of how a court phrases the cause of action, California has an obligation to protect those who come before its courts from harm under principles of equity.”); Pound, *Mechanical Jurisprudence*, *supra* note 181, at 608 (“A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last, on some matters, becomes such a nuisance that equity intervenes . . .”).

Even if it is assumed that unconscionability does not provide its own affirmative cause of action, it is possible that the status of a contract’s conscionability could nonetheless trigger separate causes of action. See, e.g., *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 580 N.Y.S.2d 952, 953 (App. Div. 1992) (rejecting a lower court’s holding that “an unconscionable agreement is merely unenforceable and does not give rise to a cause of action” as “fundamentally flawed,” and discussing how a contract’s unconscionability can give rise to a separate cause of action such as breach of an implied warranty).

228. See Roscoe Pound, *Justice According to Law III*, 14 COLUM. L. REV. 103, 116 (1914) (“In the sixteenth and seventeenth centuries the common law . . . had become so systematic and logical and rigid that it took no account of the moral aspects of causes to which it was to be applied. With equal impartiality its rules fell upon the just and the unjust. The rise of the Court of Chancery and development of equity brought about an infusion of morals into the legal system. . . .”); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 668–69 (1987) (“The equity courts thus enabled the English legal system to provide more complete remedies for violations of legal rights. It became a maxim of equity jurisprudence that ‘equity will not suffer a wrong to be without a remedy.’ The principle expressed in this maxim lay at the heart of equity because *it was the very reason for Chancery’s existence*.”) (emphasis added).

be defeated but for its intervention.”²²⁹ As a creature of equity, the doctrine of unconscionability cries out for judicial revival.

D. Allowing Affirmative Relief from Unconscionable Contracts Would Leave the Free Market and Freedom of Contract Intact

Some may claim that granting courts such wide authority to affirmatively intervene in contracts would upend the free market and freedom of contract. It could be argued that reforming contract terms—say, by reducing a loan’s interest rate—would intrude upon the legislature’s role of economic policymaking. It is often said that judges “do not have sufficient resources or time to evaluate the effects of their decisions on society, while vast resources are available to legislators to investigate such matters.”²³⁰

But this view is belied by many legislatures’ express incorporation of the UCC’s unconscionability provision into statute, which was “intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable.”²³¹ The Official Comment to UCC 2–302, adopted verbatim by many state legislatures, further provides that “the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid

229. *Cassinis v. Union Oil Co.*, 14 Cal. App. 4th 1770, 1786 (Cal. Ct. App. 1993) (“In the same spirit it is said . . . ‘Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice.’”) (quotations omitted); *see also* *Discover Bank v. Owens*, 822 N.E.2d 869, 874 (Ohio Mun. Ct. 2004) (“The function of equity is to supplement the law where it is insufficient, moderating the unjust results that would follow from the unbending application of the law.”) (citing *Salem Iron Co. v. Hyland*, 77 N.E. 751 (Ohio 1906)).

230. Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for UCC Section 2-302*, 67 CORNELL L. REV. 1, 27 (1981). *But see* W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CALIF. L. REV. 1, 49–52 (1974) [hereinafter Slawson, *Mass Contracts*] (explaining why *ex post* judicial analysis of form contracts is superior to *ex ante* legislation); *id.* at 50–51 (“Legislative legal reform on the subjects here involved would be less effective and less orderly and predictable than reform effected through the decisional processes of the judiciary. The reforms require the legal expertise of a judge and would benefit from a judge’s ability to approach them one aspect at a time . . .”).

231. CAL. CIV. CODE § 1670.5 legislative comm. 1979 cmts. (2019).

unconscionable results.”²³² This language unambiguously grants courts broad remedial power to reform unduly oppressive contracts.²³³

Courts may exercise this power to grant affirmative relief from unconscionable contracts without unduly interfering in the free market or freedom of contract.²³⁴ As the California Supreme Court held in *Perdue v. Crocker National Bank*, “protection against unconscionable contracts[] has

232. U.C.C. § 2-302 cmt.2; CAL. CIV. CODE § 1670.5 legislative comm. 1979 cmts.

Support for broad remedies against unconscionable contracts is also found in the earlier drafts of the UCC. Hunter, *supra* note 177, at 151 (discussing how earlier drafts of the Code “specifically granted the court the right to reform (rewrite) the contract by, in essence, remaking the bargain for the parties . . .”). As one Note explained:

UCC § 2-302 (Proposed Final Draft, Spring 1950) provided: “If the court finds the contract or any clause of the contract to be unconscionable, it may refuse to enforce the contract or strike any clauses and enforce the rest of the contract *or substitute for the stricken clause such provision, as would be implied under this Article if the stricken clause had never existed.*” (Italics supplied). This language also appeared in two earlier drafts. THE CODE OF COMMERCIAL LAW, art. II, part II, § 23 (Tentative Draft, 1948); UCC § 2-302 (Tentative Draft, 1949). In 1950 the substitution part of the section was stricken without explanation. UCC § 2-302, REVISION OF ARTICLE 2, 4, and Article 9 (September 1950). However, proponents of substitution might argue that since § 1-102 (3) (g) of the Code provides that “Prior drafts of text and comments may not be used to ascertain legislative intent” no inference should be drawn from the fact that the drafters struck this part of the section.

Note, *Section 2-302 of the Uniform Commercial Code: The Consequences of Unconscionability in Sales Contracts*, 63 YALE L.J. 560, 564 n.21 (1954). Indeed, support for an affirmative remedy against unconscionable contracts can in fact be found in the very first iteration of Article 2 in 1944, which was labeled the “Uniform Revised Sales Act” at the time. COMMERCIAL CODE SALES SECTIONS (SALES ACT) (ALI Council Draft No. 1 Feb. 1944). Section 23 of this 1944 draft, titled “Form Clauses, Conscionable and Unconscionable,” provides:

A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing in its entirety including the form clauses is an unconscionable contract. . . . A contract rendered unconscionable by form clauses shall be *subject to reformation in equity*.

Id. § 23, at 12–13 (emphasis added). Moreover, Section 103, titled “Remedies to Be Liberally Administered,” provides: “(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed; (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect; (3) Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Act.” *Id.* § 103, at 55.

233. See Charles H. Hurd & Philip L. Bush, *Unconscionability: A Matter of Conscience for California Consumers*, 25 HASTINGS L.J. 1, 3–4 (1973) (“[A] finding of unconscionability is made as a matter of law and supports a broad range of judicial relief. Such relief may include nonenforcement of an unconscionable contract term or, in appropriate cases, restitution based on rescission.”); *id.* n.11 (“The language ‘refuse to enforce the transaction [and] limit the application of any unconscionable aspect so as to avoid any unconscionable result’ should be construed to include at least restitutionary relief.”); Hunter, *supra* note 177, at 151 (“[T]he Code provides a court with wide latitude in fashioning remedies.”); Prince, *supra* note 6, at 484 (“The options of striking a clause or limiting its effect . . . necessarily grant the courts, at a minimum, a limited ability to reform the contract.”).

234. See Comment, *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform for Usury Laws*, 65 YALE L.J. 1, 105–10 (1955) (“The English Moneylenders Act of 1900 provides that the courts may reopen any loan made by a professional moneylender . . . if . . . the court finds the interest and all other charges ‘excessive’ and the terms of the loan ‘harsh and unconscionable.’ The English experience indicates that such a standard is a workable one which need not create undesirable uncertainty in loan transactions.”).

never been thought incompatible with a free and competitive market.”²³⁵ Inherent in the very nature of the unconscionability doctrine is the historical understanding that freedom of contract is not absolute but rather must be tempered by equitable concerns of fairness.²³⁶ These equitable principles “recognize[] the importance of a free enterprise system but at the same time will provide the legal armor to protect and safeguard the prospective victim from the harshness of an unconscionable contract.”²³⁷

When standard-form, adhesion contracts raise pervasive questions of mutual assent,²³⁸ asymmetric access to information,²³⁹ and an absence of meaningful choice,²⁴⁰ market forces may fail to produce a socially desirable result.²⁴¹ Indeed, the California Supreme Court in *De La Torre v. CashCall, Inc.*

235. *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 943 (Cal. 1985).

236. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 304 (1999) (“Freedom of contract’s reign during the early part of the twentieth century was never without limits. Justice Cardozo recognized freedom of contract as *just one of many competing values* that contract law attempts to appease.”) (emphasis added); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315–16 (1975) (arguing that freedom of contract, if “properly understood,” does not require a court to enforce every contract brought before it).

237. *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264, 265–66 (N.Y. Sup. Ct. 1969) (“There was a time when the shield of *caveat emptor* would protect the most unscrupulous in the marketplace The law is beginning to fight back against [them] From the common-law doctrine of intrinsic fraud we have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware.”).

238. See JOSHUA A.T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 45 (2017) (“Companies’ ability to bind consumers by contract has grown more powerful with the advent of information technologies. As if clicking ‘I Agree’ to fifty-page documents that no one can read were not enough, companies now claim the right to bind consumers who do nothing at all. . . . Many online contracts are considered enforceable simply because you used the webpage.”); *supra* note 8 and accompanying text (noting how most consumers are unlikely to read the contracts to which they are bound).

239. See Hugh Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW 231–62, 232 (1997) (“[I]t seems . . . likely that harsh clauses are the result of information costs. Many customers faced with standard form contracts may not know of, or understand the meaning of, the small print and may not think it worth the time and cost to find out about it.”); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) (discussing how imperfect information can cause markets to behave noncompetitively); *supra* notes 15–20 and accompanying text.

240. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.”); see also *infra* note 247 and accompanying text.

241. See, e.g., Jeff Sovern, *Free-Market Failure: The Wells Fargo Arbitration Clause Example*, 70 RUTGERS U. L. REV. 417 (2018); see also Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 36–37 (2012) (“[R]ecent contributions to economic theory suggest that the model of the self-regulating market is false. . . . Because standardized terms do not influence consumer behavior, drafters have little incentive to compete on the basis of those provisions. Thus, the forms utilized by competing suppliers of goods and services remain largely uniform, rendering consumers virtually powerless to avoid unfavorable standardized terms.”); Slawson, *Standard Form Contracts*, *supra* note 10, at 531 (“An unfair form normally constitutes a costless benefit which a seller refuses at his peril. If he fails to take advantage of it, his competitors will. Competitive pressures have worked so long and so thoroughly to make standard

explained that “a court may consider whether there are market imperfections that make it less likely that the price was set by a ‘freely competitive market’ and therefore more susceptible to unconscionability.”²⁴² It is in response to market failures such as these, where unequal bargaining power produces unduly oppressive contractual terms, that the doctrine of unconscionability is properly invoked, both offensively and defensively.²⁴³

Far from disrupting the free market, applying the doctrine of unconscionability affirmatively would in fact serve as a balanced “market and government institutions”²⁴⁴ approach to correcting common market failures:

[E]xcessively high prices relative to goods or services purchased often indicate market failures. Courts, therefore, may apply unconscionability as a substitute for market correction prevented by sellers’ monopoly power and purchasers’ high information costs. In this way, unconscionability provides courts with means for checking whether contracts are truly products of contractual liberty. It also allows courts to ensure that efficient exchanges are sufficiently equal in value to prevent parties from being unjustly enriched at the others’ expense.²⁴⁵

Unconscionability’s equitable function as an *ex post* standard, as opposed to an *ex ante* rule,²⁴⁶ demonstrates that it is properly the role of courts to intervene *ex*

forms unfair that we no longer even notice the unfairness.”); *supra* notes 8–20 and accompanying text; *infra* note 243 and accompanying text.

242. De La Torre v. CashCall, Inc., 422 P.3d 1004, 1015 (Cal. 2018).

243. See Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1833 (1994) (describing how the doctrine of unconscionability serves to rectify unfairness and inefficiency caused by market failures); see also Prince, *supra* note 6, at 480 (“The equitable roots of unconscionability reflect a traditional concern for relatively weaker parties that are more likely to be taken advantage of in the bargaining process.”).

244. See Korobkin, *Bounded Rationality*, *supra* note 9, at 1294.

245. Schmitz, *supra* note 2, at 105–06; see also DiMatteo, *Equity’s Modification of Contract*, *supra* note 236, at 329 (“The attack upon interventionist doctrine such as unconscionability is justifiable only if the system of freedom of contract is free of structural deficiencies.”).

246. For more on the distinction between rules and standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745, 1774 (1976) (observing the structural connection between rules and classical *laissez-faire* individualism); Russell Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000) (“The choice of legal form has long been described as a choice between ‘rules’ and ‘standards.’ Rules state a determinate legal result that follows from one or more triggering facts. . . . Standards, in contrast, require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion.”).

For more commentary on unconscionability as a flexible standard as opposed to a rigid rule, see Beh, *supra* note 6, at 1039 (“[U]nconscionability is not a rigid rule-based doctrine but a standards-based doctrine vested in the discretion of the court. Rather than evoking fear of unconscionability as a rule devoid of principle, judges should embrace unconscionability’s flexibility as a necessary counterweight to mindless formalism and rigidity.”); Jeannie M. Paterson & Gerard Brody, “*Safety Net*” *Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models*, 38 J. CONSUMER POL’Y 331, 332 (2015) (“There are many possible legislative responses to predatory business models . . . ranging from bans on certain practices, to ‘bright line’ rules that regulate specific kinds of conduct, and then to ‘standard-based’ regulation that prohibits misleading, aggressive, unfair, or unconscionable conduct. . . . [I]n a comprehensive and effective

post where the ostensibly free market is found not to be truly free.²⁴⁷ No less is it the province of courts to do so affirmatively.

Courts possess a variety of flexible remedies to cure contractual unfairness while nonetheless preserving the integrity of the free market and freedom of contract. For example, in his article *Fixing Unfair Contracts*, Professor Omri Ben-Shahar describes how courts can use a variety of “gap-fillers” to remedy an unconscionable contract.²⁴⁸ Courts can reduce the unconscionable term to: (1) the most unfavorable term to punish or deter the defendant’s unconscionable behavior;²⁴⁹ (2) the “most reasonable” term;²⁵⁰ or (3) the “minimally tolerable” term.²⁵¹ Ben-Shahar advocates the “minimally tolerable” gap filler, which he contends “preserves to the maximum extent possible the bargaining advantage secured in the contract.”²⁵² According to Ben-Shahar, this gap filler is “therefore the one most consistent with the idea that bargaining power ought to be respected, not undone.”²⁵³ While this “minimally tolerable term” approach arguably does not go far enough to adequately deter contractual overreach, it nonetheless provides apprehensive courts with a modest remedy that strikes a balance between freedom of contract and society’s concerns for equity and fairness.

Those who are dubious of granting courts such wide discretion to reform contractual terms commonly point to the difficulty of deciding the threshold of

consumer protection regime, prohibitions based on generalized moral standards of fairness or conscience provide an important ‘safety net’ response to predatory and other offensive market practices not caught in some other way by more specific forms of regulation.”); Schmitz, *supra* note 2.

247. See LORD HENRY H. KAMES, PRINCIPLES OF EQUITY 63–64 (4th ed. 1800) (“[W]hether a man be led against his own interest by a violent temptation or by extortion, there is still left to him in appearance a free choice. But with respect to the matters that belong to the present section, a man is led blindly against his own interest, and has no choice. This species of wrong, therefore, being more flagrant, is not neglected by courts of common law.”); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933) (“Usury laws have recognized that he who is under economic necessity is not really free. To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure.”); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 482 (1909) (“From the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors.”); *supra* notes 15–20 and accompanying text.

248. See generally Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 223 (arguing that courts should reform unconscionable contract terms to the “minimally tolerable” level through gap fillers).

249. Such gap-fillers are often referred to as “penalty default rules.” See generally Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2006) (defending the concept of penalty defaults against critics); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 126–27 (1989) (showing how penalty default rules promote efficiency by incentivizing parties to share information, and discussing how courts could use penalty defaults to remedy unconscionable contracts).

250. Cf. U.C.C. § 2–305(1) (“The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery . . .”).

251. Omri Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 223, at 877.

252. *Id.* at 879.

253. *Id.* at 877–78.

unconscionability.²⁵⁴ But that a court cannot determine the precise line between an unconscionable contract and a permissible one is no reason to deny relief altogether.²⁵⁵

Indeed, many courts have moderately reduced price terms to a tolerable amount even though they could not identify this precise bright line.²⁵⁶ For example, although the California Court of Appeal in *Carboni v. Arrospide* acknowledged that it may be “difficult to determine when that point [of unconscionability] is reached,” it nonetheless found a 200 percent interest rate unconscionable and reduced the rate to twenty-four percent.²⁵⁷ In *De La Torre v. CashCall, Inc.*, the California Supreme Court similarly recognized “how daunting it can be to pinpoint the precise threshold separating a merely burdensome interest rate from an unconscionable one.”²⁵⁸ But the court

254. See, e.g., *De La Torre v. CashCall, Inc.*, 56 F. Supp. 3d 1105, 1109 (N.D. Cal. 2014) (refusing to reduce a triple-digit interest rate, believing that the court “could not fashion a restitution award without deciding the point at which [the] interest rates crossed the line into unconscionability”). But see *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1007 (Cal. 2018) (rejecting the lower court’s holding). For commentary on this topic, see Darr, *supra* note 237, at 1826 (describing how the doctrine of unconscionability serves to rectify unfairness and inefficiency caused by market failures); Prince, *supra* note 6, 487 (“The inherent difficulty in . . . policing for excessive prices is the difficulty of determining at what point the price becomes unconscionable.”).

255. See, e.g., *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 563 (1931) (noting that, in cases where precise damages cannot be determined, “it would be a perversion of fundamental principles of justice to deny all relief to the injured person,” and suggesting that a “just and reasonable inference” of approximate damages is sufficient); *id.* (“Where the [wrong] is of such a nature as to preclude the ascertainment of the amount of damages with certainty . . . it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.”).

256. See, e.g., *O’DONNELL & MCDUGAL*, *supra* note 66, at 456, 460–61; *id.* at 463–64 (discussing the “judicial function” of reforming an unconscionable contract); *id.* at 467 (“As I expected, Judge Schneider made short shrift of Paramount’s contention that we were improperly using unconscionability as a sword rather than a shield. As for Paramount’s argument that he could not strike down portions of the net profit contract . . . the Court pointed to a specific provision of the California Civil Code that explicitly authorized him to strike down an entire contract or any portions.”); *id.* at 468 (“As for the remedy in the wake of his ruling, the judge deferred a final decision pending further proceedings. My clients would not be allowed to reap ‘a windfall’—‘an award far beyond reasonable expectations of the parties when the contract was executed’—but they were entitled to an ‘equitable award’ of ‘fair and reasonable’ damages, Judge Schneider indicated.”); *id.* at 475 (“Judge Schneider’s latest ruling did not specify what standard he would use to award damages. All we knew in January 1991 was that he would not slavishly apply paramount’s net profit contract. Nor did we know when the judge would set a trial date for damages.”); *id.* at 487–89 (discussing various proposed approaches to reforming an unconscionable contract and describing the court’s ultimate adoption of a “fair market value” theory of reformation).

257. *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 82 (Cal. Ct. App. 1991); accord *State ex rel. King v. B&B Inv. Grp., Inc.*, 2014-NMSC-024, 329 P.3d 658, 675 (N.M. 2014) (finding consumer loans unconscionable under common law, rejecting lower court’s conclusion that calculating restitution would be an “arbitrary and unjustified” task “without precise figures to draw upon,” and subsequently reducing interest rates from “1,147.14 to 1,500 percent” to the statutory default of 15 percent). For an in-depth analysis of the New Mexico Supreme Court’s holding in *B&B*, see generally Adriel D. Orozco, *The Judicial Expansion of an Old Tool to Combat Predatory Lending in New Mexico*, 46 N.M. L. REV. 191 (2016).

258. *De La Torre*, 422 P.3d at 1007.

nonetheless explained that this difficulty “is no reason to ignore the clear statutory embrace here of a familiar principle—that courts have a responsibility to guard against consumer loan provisions with unduly oppressive terms.”²⁵⁹ As these cases make clear, the mere possibility of an imprecise remedy is no excuse for tolerating injustice.

CONCLUSION

Unconscionability today is a shield. It must also become a sword. The doctrine of unconscionability has played an important historical role as an equitable safeguard against contractual overreach. However, courts’ unwillingness to apply the doctrine affirmatively unjustly enriches wrongdoers and contravenes the “settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”²⁶⁰ As businesses increasingly degrade consumer expectations with offensive, non-negotiable contract terms, adequate consumer remedies are more essential now than ever. Both morally and pragmatically, the doctrine of unconscionability as an affirmative, restitution-seeking sword is superior to the doctrine’s current limited use as a defensive shield. While California’s Consumers Legal Remedies Act was a significant achievement in reforming unconscionability’s shortfalls, the Act’s ambiguity has left countless victims of unconscionable credit agreements unprotected. The California Legislature should remove this ambiguity by amending the CLRA to expressly cover consumer credit transactions. Until then, California consumers may find solace in the equitable safeguards of the Unfair Competition Law by invoking the California Supreme Court’s landmark opinion in *De La Torre v. CashCall*. Finally, courts should reclaim the inherent equitable powers long residing in courts of equity by allowing plaintiffs to assert unconscionability offensively under the common law. Once armed with the sword of affirmative unconscionability, consumers might finally pierce the protective armor of unconscionable conduct that the defensive shield of unconscionability has long failed to combat.

259. *Id.*

260. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (citing WILLIAM BLACKSTONE, *Book 3: Of Private Wrongs*, in COMMENTARIES ON THE LAW *109).